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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1689.

LITTON SYSTEMS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner Litton Systems, Inc. ("Litton") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this matter on April 4, 1978.

OPINIONS BELOW.

The May 25, 1977 Memorandum Opinion and Order of the United States District Court for the Eastern District of Virginia, Honorable Albert V. Bryan, Jr., J., dismissing an indictment of Litton on the ground of prosecutorial misconduct, is not reported and appears in the Appendix at A1-A12. The April 4, 1978 opinion and judgment of the Court of Appeals, vacating Judge Bryan's Order, are not yet officially reported and appear in the Appendix at A13-A25. The Court of Appeals opinion is unofficially reported at 23 Criminal Law Reporter 2130-2131. The April 27, 1978 *per curiam* Order of the Court of Appeals, denying Litton's petition for rehearing, is not reported and appears in the Appendix at A26.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 4, 1978. Litton's timely petition for rehearing was denied on April 27, 1978, and this petition was filed within 30 days of that date. The statutory provision which confers jurisdiction on this Court to review the judgment of the Court of Appeals by writ of certiorari is 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Litton built nuclear submarines for the government and experienced the excess costs endemic to such specialized defense contracting. It sought civil reimbursement for these costs and received a substantial award. For more than four years the government conducted a parallel criminal investigation of Litton's claims. After the civil award was final, and despite an admitted insufficiency of evidence to indict for any crime, the government threatened Litton with indictment unless it consented to reopen the *civil* award. Litton refused. The government thereupon hastily obtained a one count indictment for knowingly making a false contract claim. The District Court found the government's threat extortionate and the indictment vindictive. It dismissed the indictment. The Court of Appeals, labelling this extortionate criminal threat for civil advantage mere "plea bargaining," vacated. Therefore, the questions presented are:

1. Does the government deny due process when its prosecutor, who admittedly lacks evidence to seek an indictment for *any* crime, threatens a presumptively innocent contractor with indictment solely in order for the government to gain for itself substantial rights in a civil litigation with the contractor?

2. Can the label "plea bargaining" properly be used to disinfect a retaliatory indictment vindictively sought by the government when the contractor, protesting its innocence, refused to yield to such extortion and where: (a) the government lacked sufficient evidence to charge any crime at the time of the threat and failed to show any new evidence thereafter; (b) the government did not seek a plea to any crime, but sought instead to obtain an otherwise unattainable advantage in its civil litigation with the contractor; and (c) the government repudiated its own so-called "plea bargaining offer" when the contractor, before indictment, sought to accept it?

3. Must an indictment which is the product of actual prosecutorial vindictiveness be dismissed?

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 287 of Title 18, United States Code, reads as follows:

> "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE.

The Court of Appeals, by reversing the District Court's discipline of the government in this case, condoned extortion by the government and permitted a vindictive indictment [1] to stand. By doing this it eviscerated the safeguards erected by this Court to curb vindictive prosecutions. Moreover, by handing the government the powerful weapon of criminal threat in the government's civil contract dealings with defense contractors, the Court of Appeals created a dangerous precedent with the potential for incalculable harm for this country's troubled defense procurement.

A. This Case Arises Out of Litton's Role as an Important Defense Supplier.

Litton's Ingalls Nuclear Shipbuilding Division is one of only three private shipyards building nuclear-powered submarines for the United States government. In 1968, Litton and the Navy signed a contract for construction of three nuclear-powered attack submarines. Under the contract, any dispute between the parties was to be decided in the first instance by the "contracting officer," a Navy officer, but Litton had the right to appeal his decision to the Armed Services Board of Contract Appeals ("ASBCA")[2] for *de novo* review. In 1970, Litton requested the contracting officer to increase the price of the three submarines, in order to compensate Litton for delays and excess costs caused by the Navy. After the contracting officer denied the bulk of Litton's request in 1972, Litton appealed to the ASBCA.

1. The District Court had jurisdiction because of the allegation that Litton had committed a federal offense. 18 U. S. C. § 3231.

2. The ASBCA "operates as a judicial tribunal and its procedures are closely similar to those of a Federal District Court sitting without a jury." (Affidavit of Adminstrative Judge Richard Solibakke, Chairman of the ASBCA, filed by the prosecutors in the District Court.) ASBCA decisions are final against the government, and not subject to judicial review at the instance of the government except in a case of fraud. *S & E Contractors, Inc. v. United States*, 406 U. S. 1 (1972). ASBCA decisions are binding against the government in subsequent litigation under the principles of *res judicata* and collateral estoppel. *United States v. Utah Construction & Mining Co.*, 384 U. S. 394, 421-422 (1966).

On April 16, 1976, after a 69-day *de novo* trial before the ASBCA in 1973 and 1974, the Board rendered a unanimous 116-page decision awarding Litton more than $16 million in increased compensation. *Ingalls Shipbuilding Division, Litton Systems, Inc.*, 76-1 BCA Decisions ¶ 11,851 (1976). Thereafter, the Navy proposed to Litton that, "if Litton did not file a motion for reconsideration the Navy would not file a motion for reconsideration." [3] Litton agreed; neither party filed a motion for reconsideration; and the $16 million award became final on May 16, 1976.

B. The Government Brought Its Police Power Into This Contract Dispute When the Justice Department Investigated Litton.

As early as August 4, 1972, the Navy Department began a parallel investigation of Litton's request for reimbursement of the additional costs on the submarine contract, for the alleged purpose of determining whether Litton had violated 18 U. S. C. § 287. A report on the Navy Department's inquiry was referred to the Justice Department on January 5, 1974. A special grand jury was impanelled in Alexandria in March, 1975, solely to investigate Litton. Just before the term of the special 18-month grand jury was due to expire in September, 1976—more than four years after the Navy began its inquiry in August, 1972—the prosecutors conceded that they "ha[d] a duty not to pro-

3. Court of Appeals Appendix ("4th Cir. App.") 39. Litton could have requested, in a motion for reconsideration, that the ASBCA increase its award.

ceed toward indictment"[4] because they did not have a "prosecutable case"[5] and an indictment would be useless.[6] Simply stated, the prosecutors did not believe they had sufficient evidence to justify *any* indictment of Litton for any crime.[7] Although they allegedly believed personally that Litton's request for reimbursement contained errors, they conceded that "whether this had been done knowingly with requisite criminal intent . . . was an open question."[8]

As the Court of Appeals conceded, "the government . . . had not yet obtained sufficient evidence of willfulness and criminal intent to warrant criminal prosecution." (A21.) Since neither 18 U. S. C. § 287 nor any other federal criminal statute applies to claims which are merely "incorrect" but only to claims which are "knowing[ly] . . . false, fictitious or fraudulent," the prosecutors had failed *after more than four years of investigation* to obtain sufficient evidence to prosecute Litton for *any* crime.

C. In September of 1976 the Government Improperly Mingled the Civil and Criminal Sides of This Case.

At two meetings held in September 1976, the prosecutors "[sat] down with [Litton's] counsel for two hours going through everything the government has in its case."[9]

4. Government's Court of Appeals Brief at page 45.

5. Government's Court of Appeals Brief at page 6 n. 9.

6. 4th Cir. App. 190.

7. 4th Cir. App. 49, 50, 116, 165, 166, 190-192.

8. 4th Cir. App. 48.

9. Statement of Assistant United States Attorney Fisher at April 29, 1977 argument in the District Court in opposition to Litton's motion for a bill of particulars. (Transcript at pages 14-15, 26-27.) Thus, *after* indictment, the government was contending that Litton did not need a bill of particulars because the prosecutors had allegedly disclosed their entire case to Litton in September 1976; *i.e.*, nothing was added to the government's case after September 1976. See pages 11 and 21 n. 20, *infra*.

The prosecutors told Litton that the term of the special grand jury would expire without any indictment being returned, because they "had not yet obtained sufficient evidence of willfulness and criminal intent to warrant prosecution." (A21.)[10]

Nevertheless, the District Court found that the government in these discussions "used the implied threat of indictment in an effort to obtain reconsideration of what Litton, presumptively innocent, was otherwise entitled to." (A6.)

The substantial rights which the prosecutors sought to force Litton to "yield . . . as the price for not being prosecuted" (4th Cir. App. 56) included:

> (1) The reopening of Litton's final ASBCA award and its resubmission to "the ASBCA Judge who had initially heard the matter";[11]

10. The meetings were initiated by the prosecutors. The Court of Appeals states in its April 4, 1978 Opinion that Litton's then counsel had "asked for advance notice if [the prosecutors] decided to seek an indictment because he wanted a chance to attempt to dissuade the government from proceeding." (A14.) But the September 1976 meetings were not a response to this request, because the prosecutors had decided *not* to seek an indictment. The Court of Appeals also states that Litton's counsel agreed "that the discussions would not be taken as a threat." (A15.) But the Court of Appeals acknowledges that Judge Bryan found "that the situation was so inherently coercive that no prudent attorney could have refused to entertain the proposal." (A18.) Indeed, the Assistant United States Attorney conceded at oral argument before Judge Bryan that Litton's counsel "probably had no alternative other than to come over and meet," and that the so-called waiver which he had exacted from Litton's counsel, didn't "make it any less a threat." May 20, 1977 transcript at pages 75, 77; 4th Cir. App. 114, 116. See also Judge Bryan's Opinion. (A8.)

11. Prosecutor Dunham admitted at oral argument before Judge Bryan that he knew, when he made this demand, that Administrative Judge B. Lee Bird, the ASBCA judge who presided at the 69 day trial and wrote the 116 page ASBCA opinion, had been interrogated about his decision in May 1976 by Prosecutor Kibby and in July 1976 by an FBI agent at the direction of the prosecutors. (May 20, 1977 oral argument transcript, pages 84

(2) The waiver of Litton's rights under the common law and Rule 6(e), F. R. Crim. P., to grand jury secrecy; and

(3) The waiver of Litton's right to object to introduction of the grand jury record—replete with hearsay, irrelevant and incompetent evidence, none of which had been subject to cross examination—in the reopened ASBCA proceeding.

(4th Cir. App. 50, 59, 60; Government's Court of Appeals Brief at pages 8, 16.)

Litton promptly complained to the Deputy Attorney General that it "was being threatened with indictment if it refused to reopen the [ASBCA] proceedings," but he rejected Litton's complaint. (A16.) On November 1, 1976, Litton notified the government that it refused to yield to its extortionate demands.

D. The Government Retaliated Vindictively Against Litton for Its Refusal to Submit to Extortion.

Shortly after Litton rejected the prosecutors' September 1976 demands, they told Litton that they were going to obtain an indictment. In response to this new, more menacing extortion, Litton, before any indictment was returned, capitulated, and agreed to cede its rights as a civil litigant and stipulate to a reopening of the ASBCA case. However, the prosecutors, now clearly motivated by the vindictiveness which the District Court later found, repudiated the very "offer" they earlier had made. Encouraged by their success to that point, they undoubtedly believed

11. (Cont'd.)

and 86, 4th Cir. App. 123, 125.) Judge Bryan found that the interrogation of Judge Bird by the prosecutor and the FBI "could only carry the potential for depreciation of the ASBCA's impartiality and vitiation of its decision in any reopened claim or in [other] future claims involving the defendant." (A9.)

that more civil advantages could be obtained for the government after indictment. An unspecific one count indictment against Litton was obtained on April 6, 1977 under 18 U. S. C. § 287.[12] (A27-A34.)

There followed a meeting of Litton's counsel and *all* the prosecutors on April 19, 1977, at the instance of Judge Bryan. At this meeting Litton's counsel expressed surprise that the prosecutors had obtained an indictment in view of the lack of evidence of criminal intent. In reply, one of the prosecutors, uncorrected by the others, made the devastating admission which summarizes the government's extortionate and vindictive approach throughout this case: "*Litton bought this indictment.*" (Emphasis added.)

Judge Bryan found that in this outburst "[t]he perception of the grand jury as an intimidatory device was implicit. . . . In his [the prosecutor's] opinion, by refusing to agree to a reconsideration of the award it had gained through the ASBCA, Litton had brought the indictment upon itself." (A7 n. 3.)[13]

12. The indicting grand jury heard 6 days of testimony; the special grand jury heard 25 days of testimony before it expired without returning an indictment. A substantial part of the testimony before the indicting grand jury was given by FBI agents who summarized testimony before the special grand jury. Judge Bryan found that the extensive use of summary testimony before the indicting grand jury was "further evidence of the cynical view that has been taken of the grand jury in this case, namely, as a mere echo of the office of the United States Attorney." (A9.) Later, when the government belatedly turned transcripts of the summaries over to Litton, it was revealed that the summaries were materially inaccurate. Compare the summary testimony of FBI Agent Bullard before the indicting grand jury at pages 5, 7, 9, and 60 (February 28, 1977) (4th Cir. App. 1001, 1003, 1005 and 1046) with the testimony of witness Bergeson before the special grand jury at page 12 (March 19, 1976), pages 65-66 (March 20, 1976) and page 9 (September 1, 1976) (4th Cir. App. 990-992, 995).

13. The Court of Appeals chose to disregard the prosecutor's boast solely on the ground that "[t]here [was] no evidence . . . that [this] Assistant [United States Attorney], who was not in

E. The Unlawful Approach of the Prosecutors Is Shown by Their Failure to Comply With This Court's Standards.

Under *North Carolina v. Pearce*, 395 U. S. 711 (1969) and *Blackledge v. Perry*, 417 U. S. 21 (1974),[14] prosecutors must dispel any appearance of vindictiveness, *at the time an apparently vindictive indictment is returned*, by placing the "new evidence" which allegedly justifies the indictment on the record. See page 20, *infra*. Although the prosecutors later claimed that such "new evidence" was uncovered between November 1, 1976 when Litton rejected their "offer" and January 17, 1977 when the Department of Justice decided to prosecute, they failed to place any such evidence on the record at any time.

The text of the indictment merely incorporates the phraseology of the statute (A33) and there was nothing else placed on the record at the time of the indictment to show that the prosecutors had any "new evidence" of

13. (Cont'd.)

charge of trying the government's case, reflected the views of the officials in the Department of Justice who were responsible for instituting the criminal prosecution." (A20 n. 2.) However, the outburst that "Litton bought this indictment" occurred at a formal meeting in the United States Attorney's office and in the presence of *all* of the counsel for both Litton and the government, including the three prosecutors who were responsible for presenting the case to both grand juries, and trying the case, and not a word of contradiction was ever uttered by *any* prosecutor, despite the fact that counsel for Litton "pressed . . . for an explanation." (4th Cir. App. 248.) The Court of Appeals opinion also stated that Attorney General Bell "*approved* prosecution of the case on February 7, 1977." (A17, emphasis added.) However, Attorney General Bell had been in office on that date for only 13 days and was obviously relying on his subordinates, including this prosecutor, who recommended that Litton's offer to agree to the September 1976 demands be rejected. (4th Cir. App. 198.)

14. *Pearce* and *Blackledge* were expressly reaffirmed in this Court's recent decision in *Bordenkircher v. Hayes*, 54 L. Ed. 2d 604 (1978).

criminal intent. Following indictment Litton demanded at every stage of the proceedings below that the "new evidence" be identified. The prosecutors not only failed at every stage to do so, but actually *opposed* Litton's motion for a bill of particulars on the ground that it was unnecessary since they had already disclosed "everything the government has in its case" in September, 1976. In other words, the prosecutors opposed the request for a bill of particulars on the ground that they had *no new evidence to disclose*. See page 6 n. 9, *supra*.

F. The Indictment Was Dismissed as a Prophylaxis.

When the government's course of conduct was clear, Litton moved for dismissal of the indictment. On a full record and after extensive argument and representations by the prosecutors, Judge Bryan dismissed the indictment. He accurately summed up the serious misconduct in the case as follows (A6-A10):

"No matter how benign a view of the matter is urged by the government, the truth of it is that the government wanted a 'second bite at the apple' in its controversy with Litton over the issue of reimbursement; that it used the *implied threat of indictment* in an effort to obtain reconsideration of what Litton, presumptively innocent, was otherwise entitled to; and that when Litton, as was its right, refused to forego that entitlement, namely, the finality of the civil award, the government *retaliated—made good its threat*—by producing an indictment. *This is a serious abuse of prosecutorial power.* (Emphasis added.)

". . . . [W]hat is reprehensible here is the *threat* to use, as *well* as the actual use of, the grand jury as a bargaining tool in an effort to upset the final civil award to which Litton was entitled. (Emphasis in original, footnote omitted.)

". . . . Here, not only at a time when the defendant was protesting its innocence, but at a time when the government, according to its brief, had no evidence of criminal intent, the investigating grand jury was used as a bargaining tool *to effect a reopening of the matter before the ASBCA*. (Emphasis added, footnote omitted.)

* * * *

". . . [W]hen prosecutorial discretion is abused, as here, dismissal of the indictment as a *prophylaxis* is warranted. *Cf. United States* v. *DeMarco*, 550 F. 2d 1224 (9th Cir. 1977) [*cert. denied* 54 L. Ed. 2d 85 (1977)]. While the circumstances here do not carry the procedural 'due process implications' found to support the dismissal in *DeMarco*, the Court has no difficulty discerning abridgment of the defendant's substantive due process rights in permitting the government's conduct. The determination and review of *civil* disputes such as the one at the *core of this prosecution* is governed by an established statutory and regulatory scheme. *Allowing the government to circumvent the finality otherwise accorded the administrative resolution of contract disputes by threatening criminal prosecution in substance abrogates the private party's right to hold the government to its own rules.* At the very least the Court is warranted in exercising its supervisory power over federal prosecutors where there is present *deliberate and disingenuous* conduct." (Emphasis added.)

In so deciding Judge Bryan clearly recognized the serious implications of permitting the government to intermingle its police powers with its role as a civil litigant.

The Court of Appeals missed this crucial point entirely and vacated, apparently because it looked only at

the government's interest as a prosecutor and ignored the government's obligation as a contractor under our free enterprise system to deal fairly and without abusing the government's criminal powers. The Court's mistake is shown by its labelling of the government's action as "plea bargaining," [15] instead of extortion, which it clearly was.

In plea bargaining, nothing is involved beyond the criminal process and its proper, fair and expeditious administration. Yet here, the Court of Appeals called the government threat "plea bargaining", despite its acknowledgement of the facts that the government "had not yet obtained sufficient evidence of willfulness and criminal intent to warrant prosecution" (A21) and that "[n]evertheless, Litton was asked to forego a right as a *price* for the government's termination of the investigation. Specifically, Litton was asked to *give up its right* to bar the Board's reconsideration of its claim." (A19-A20, emphasis added.)

In a case like the present, in contrast to every case involving plea bargaining, the government's role as a fair contractor, bound by contract law and the rules governing

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15. Compare the misinterpretation of *Bordenkircher* by the Court of Appeals with the actual language of the *Bordenkircher* Opinion. Court of Appeals: "[T]he district court concluded that it was unlawful for the prosecutor to use the implied threat of indictment to deter Litton from exercising a legal right. But this is precisely what [*Bordenkircher* v.] *Hayes* allows a prosecutor to do when he is bargaining with the potential defendant of a threatened indictment." (A20.) *Bordenkircher* Opinion: "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort [case cited], and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' [Cases cited.]" 54 L. Ed. 2d at 610. And also: "There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise." 54 L. Ed. 2d at 612, footnote omitted.

contract disputes, is the crucial factor. By vacating Judge Bryan's proper disciplining of the government for its extortion and vindictiveness, the Court of Appeals gave the green light for abuse in the future. It reached this dangerous result by misconstruing three important and carefully balanced decisions of this Court: *North Carolina v. Pearce*, *Blackledge v. Perry*, and *Bordenkircher v. Hayes*, *supra*. Only this Court can correct this serious error.

REASONS FOR GRANTING THE WRIT.

A. The Decision of the Court of Appeals Creates a Threat to Defense Contracting of Far-Reaching Consequence.

This is a case about how the United States government should deal with persons with whom it contracts. More specifically it is about the treatment of defense contractors. The government appears in this case in a double capacity—that of a defendant in a contract action and that of criminal prosecutor. The abuse of those dual capacities makes this case more serious and more far-reaching in its impact than the strictly criminal law decisions which the Court of Appeals misconstrued below.

The philosophy of the criminal law permits the government to bring the full weight of its power to bear against the individual when he has violated the law, but the jurisprudence of this Court holds that the power must be fairly applied. Considerable debate may exist over the extent of the restrictions, technical and otherwise, which should be imposed upon the exercise of the government's prosecutorial powers. The concern for fairness was present in *North Carolina v. Pearce* and *Blackledge v. Perry, supra*. A balance of concerns was struck in *Bordenkircher v. Hayes, supra*, in the important administrative area of plea bargaining. The philosophy which governs the theory of plea bargaining is analyzed in that case. It relates to the benefits conferred on all by efficient judicial administration.

These concerns for the fair and efficient administration of the criminal law are certainly present in this case. However, there is also present an additional element not found in any other case which renders what the government did here doubly egregious. That, of course, is the government's abuse of its dual capacity.

Therefore, the decision below was not only in direct conflict with the balance struck by this Court in *Pearce*, *Blackledge* and *Bordenkircher*—a reason more than sufficient in importance to justify this Court's grant of certiorari as discussed below—it misapplied those decisions to confer on the government an unlawful power with impact far beyond the criminal process dealt with in those cases.

The Court of Appeals condoned the government's use of its criminal law powers solely to obtain an otherwise unattainable advantage in *civil* litigation at a time when it had no evidence of *any* criminal conduct. The now declared right of the government to assert its criminal administrative might in a purely commercial controversy, as a threat to coerce a contractor to give up substantial rights *when it admittedly lacks sufficient evidence of criminal intent to indict anyone for anything*, gives the government the power to change the rules in midstream even when the dispute is *only* about *presumptively innocent errors* in a large and complex commercial transaction. Approval of the deliberately vindictive use of these awesome powers of the sovereign under the circumstances found here by the District Court must be expected to deter future potential contractors from exposing themselves to such threats. The inevitable result will be that few will be so brave or so foolish to have the temerity to enter into contracts with the government, a serious blow to our national defense.

The potential conflict between the government's civil and criminal duties in defense contracting is inherent. On the one hand, it has a duty to the bidder to contract fairly and to adhere to the proper civil administration of contracts. On the other hand, it has a duty not to be imposed upon by contractors, since it is using public monies. These duties can and should be kept separate. The separation is embodied in 18 U. S. C. § 287, which makes "knowing"

intention to defraud the government the crucial element of criminality. This statute maintains the proper balance between the fact that innocent errors will inevitably occur in claims and the need to guard against willful or evilly motivated attempts to profit at the government's expense.

This crucial element of "knowledge" was at all times missing from the government's case against Litton. Therefore, when the Court of Appeals approved the government's use of its criminal powers to gain an advantage in a civil case at a time when any prosecution admittedly would have been improper, it destroyed the critical balance of interests which Congress had made.

Henceforth, the Court of Appeals now tells the government, the built-in limitation in 18 U. S. C. § 287 can be ignored and the threat of indictment can be freely used as a tool of civil contract negotiations and litigation. This is clearly wrong, from the point of view of statutory construction, due process to the contractor, proper government behavior and the national interest.

Civil disputes with the government must be resolved on their own merits (including any defenses of fraud). Criminal investigations and prosecutions (including plea bargaining) should also proceed on their own merits and under the rules of criminal jurisprudence which this Court has delineated. That the two should never be intermixed by the only party with the power to do so, the government, for the government's own advantage, should not even require statement. But this is the very point which the Court of Appeals missed or chose to ignore. In doing so it created perhaps the first precedent in the history of American jurisprudence in which such an irregularity has ever been condoned.

The evil in this precedent can be simply illustrated. The Disciplinary Rules of the American Bar Associa-

tion provide: "A lawyer shall not present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter." [16] The Court of Appeals for the Ninth Circuit and even the Court of Appeals for the Fourth Circuit have disapproved and severely chastized this very behavior. *MacDonald v. Musick*, 425 F. 2d 373 (9th Cir. 1970) *cert. denied* 400 U. S. 852 (1970); *Ganger v. Peyton*, 379 F. 2d 709 (4th Cir. 1967). Now the Court of Appeals, ignoring ethics and its own precedent, has told the government lawyers they can indeed "threaten to present criminal charges solely to obtain an advantage in a civil matter." In doing this, the Court of Appeals has abruptly changed the rules of defense contracting, denied Litton due process, and put the whole program of defense procurement in jeopardy.

B. The Decision of the Court of Appeals Is in Conflict With This Court's Decisions in Pearce and Blackledge.

In *North Carolina v. Pearce, supra,* Mr. Justice Stewart, writing for the Court, held that it was a denial of due process for a judge to impose a more severe punishment after a second conviction upon a defendant who successfully attacked his original conviction. 395 U. S. at 724-725. In order to insure that defendants would not be deterred from asserting their rights, the Court adopted a prophylactic rule:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." 395 U. S. at 725. (Footnote omitted)

16. ABA Code of Professional Responsibility, DR 7-105(A). See also EC 7-21.

The Court therefore required that, whenever a more severe sentence was imposed after a new trial, "the reasons for . . . doing so must affirmatively appear." 395 U. S. at 726. As Mr. Justice Stewart made clear, conclusionary justifications outside the record were insufficient. Instead, "objective information concerning identifiable conduct on the part of the defendant" and "factual data" were required to be "made part of the record." 395 U. S. at 726.

In *Blackledge v. Perry, supra,* Mr. Justice Stewart, again writing for the Court, held that the *Pearce* prophylactic rule should also be applied to deter "the opportunities for [prosecutorial] vindictiveness." 417 U. S. at 27. The Court emphasized that actual retaliatory motivation need not exist, since due process requires that a defendant be freed even of apprehension of retaliatory motivation. 417 U. S. at 28.

The decision of the prosecutors to charge Litton with a crime, only a few months after they admitted that the government's four year investigation had failed to produce sufficient evidence to prosecute Litton for any crime *and* only a few months after Litton rejected their demands to reopen its $16 million ASBCA award, was vindictive on its face.[17] The vindictiveness was underscored when the

17. As both Judge Bryan (A9-A10) and the Court of Appeals (A19-A20) recognized, the purpose of the threat was to deprive Litton of its due process rights and contract rights in the finality of the $16 million ASBCA award, a finality to which the government had contractually agreed. *Cf. Lynch v. United States*, 292 U. S. 571, 579 (1934); *United States v. Larionoff*, 431 U. S. 864, 879 (1977).

prosecutors decided to charge Litton with the *same crime* which was the subject of the September 1976 threats, and rejected Litton's effort to accept the *same* "offer" which the prosecutors had made in conjunction with the threats.[18] Where the issue is only one of an "appearance" of vindictiveness as in *Pearce* and *Blackledge*, such a charge can be brought only if there is new evidence to support it, thereby negating the "appearance" of vindictiveness.[19] *North Carolina v. Pearce*, 395 U. S. at 726, *Blackledge v. Perry*, 417 U. S. at 27. Since the burden for placing the "objective information" and "factual data" constituting such new evidence in the record was on the prosecutors, their failure to do so at any time—either pre- or post-indictment—compels the conclusion that *there was no new evidence*. See also *United States v. Groves*, 571 F. 2d 450 (9th Cir. 1978); *United States v. DeMarco*, 550 F. 2d 1224 (9th Cir. 1977) *cert. denied*, 54 L. Ed. 2d 85 (1977) and *United States v. Ruesga-Martinez*, 534 F. 2d 1367, 1369 (9th Cir. 1976). Rather than dispelling the appearance of vindictiveness here as required by this Court, one of the prosecutors expressly confirmed it when he stated in the presence of *all* the Assistant United States Attorneys

18. In *Bordenkircher*, the Court carefully limited the "plea bargaining" exception to *Pearce* and *Blackledge* to cases where "the accused is free to accept or reject the prosecution's offer." 54 L. Ed. 2d at 611. At oral argument in *Bordenkircher* on November 9, 1977, Mr. Justice Stewart stated that the question of whether there was an "opportunity for additional bargaining" after the prosecutor made a charging decision "might be a dispositive one." Transcript at pages 40-41. The defendant Hayes' counsel responded that the offer of a five year sentence recommendation was still open after the prosecutor's threat. Transcript at pages 43-44. In the instant case, by contrast, when Litton attempted, *before* indictment, to accept the so-called "bargain", the government refused to let it do so.

19. The actual vindictiveness, which Judge Bryan found in this case, could not be negated by any new evidence. See pages 26-27, *infra*.

responsible for presenting this case to both grand juries and for trying this case, that "Litton *bought* this indictment." (Emphasis added.)

The Court of Appeals improperly sought to evade the requirements of *Pearce* and *Blackledge*, that the prosecutors place in the record new evidence to dispel the appearance of vindictiveness, by reasoning that the instant case fell within the *Bordenkircher* plea bargaining exception.[20]

However, the extortionate discussions between Litton and the prosecutors about the ASBCA civil case in September 1976 had none of the characteristics of "plea bargaining" as that term is used in *Bordenkircher*. First, in stark contrast to *Bordenkircher* where the defendant was "plainly subject to prosecution" at the time of the plea bargain discussions (54 L. Ed. 2d at 612), the prosecutors investigating Litton admitted that they lacked sufficient evidence to indict Litton and admitted that it was an "open question" whether Litton was guilty of *any* crime. Second, and also in stark contrast to *Bordenkircher*, Litton was not "free to accept or reject the prosecution's offer" (54 L. Ed. 2d at 611) because in 1977, when Litton learned for the first time that the government intended to make good its

20. The only reference to "new evidence" in the Court of Appeals opinion is a single sentence in a discussion of the prosecutors' refusal to bargain after deciding to make good their threat and charge Litton with a crime: "Certainly, after new evidence of the defendant's wrongdoing has been uncovered, prosecutors should not be bound by an offer rejected months before when the case presented quite a different profile." (A21-A22.) Apparently, the Court of Appeals simply assumed, without *any* support in the record, that there was "new evidence." But neither the prosecutors (whose burden it was under *Pearce* and *Blackledge*) nor the Court of Appeals ever identified any "objective information" or "factual data" constituting any such "new evidence". See *Pearce*, 395 U. S. at 726. Indeed, the prosecutors admitted that there was no new evidence by opposing Litton's request for a bill of particulars in the District Court on the ground that Litton had knowledge of *all* of the government's case since *September, 1976*. See page 6 n. 9, *supra*.

threat and obtain an indictment, and Litton sought to accept the government's "offer", the prosecutors refused to bargain and repudiated their own proposal. Third, the prosecutors were not seeking "to persuade [Litton] to forego [its] right to plead not guilty" to a *crime* (54 L. Ed. 2d at 611), but rather were improperly using the criminal process to force Litton to surrender substantial rights in the *civil* case. If the Court of Appeals' erroneous characterization of improper police power influence on civil contract claims as "plea bargaining" is allowed to stand, two different, equally serious dangers will result. The government's role as a contractor will be seriously tainted and the "exception" in *Bordenkircher* will emasculate the rule of *Pearce* and *Blackledge*.

C. The Decision of the Court of Appeals Upsets the Careful Balance Struck by This Court Between the Protections of Pearce and Blackledge and the Policy of Bordenkircher.

In *Pearce* and *Blackledge* this Court, through Justice Stewart, properly held that vindictiveness, actual or apparent, has no role in the government's carrying out of the administration of criminal justice. This proper rule presented apparent problems in the area of plea bargaining, since a factual feature of such bargaining is that the bargaining may not succeed and the prosecutor, after offering a lower penalty, may have to ask for a higher one at trial. Thus plea bargaining bore a superficial resemblance to the type of increased penalty held to be vindictive in *Pearce* and *Blackledge*. In *Bordenkircher*, again speaking through Justice Stewart, the Court harmonized this apparent conflict. The mere fact that the prosecutor may resort to a more severe penalty when bargaining fails will not be presumed to show vindictiveness and will not put undue

pressure on the defendant, so long as he is free to accept or reject the bargain.

The decision of the Court of Appeals below wreaks havoc on this Court's carefully worked out balance. The following factual distinctions in this case show why:

1. The government was not in fact engaged in bargaining as to the defendant's "right to plead not guilty" or any aspect of criminal procedure, but rather in extortion in the civil field using criminal procedure as a threat.

2. In the present case, the trial court *in fact* found actual willful vindictiveness. The *Bordenkircher* presumption of propriety was therefore inapplicable.

3. The defendant in *Bordenkircher* had been indicted and was plainly subject to prosecution as a habitual felony offender. In this case, in contrast, even the Court of Appeals conceded that the government "had not yet obtained sufficient evidence of willfullness and intent to warrant prosecution." (A21.)

4. In *Bordenkircher* the Court held that there is no "element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." 54 L. Ed. 2d at 611. In the present case, when Litton capitulated, the government repudiated its own "offer." Thus Litton was not free to accept or reject the prosecution's "offer."

As of September, 1976, a massive four-year investigation, including a special 18-month grand jury, had failed to produce sufficient evidence of criminal conduct to justify an indictment. *Any* punishment of Litton was therefore entirely inappropriate and contrary to law. Quite

simply, there was and could have been no plea bargain at that point. Instead, the government used the threat of indictment to achieve a much desired result in *civil* litigation. The evil which the District Court properly suppressed in its order of dismissal is thus *not* "plea bargaining," but rather *the wholly improper use of prosecutorial power at the wrong time for the wrong purpose as a weapon in civil litigation.*

D. The Decision of the Court of Appeals Is in Conflict With the Ninth Circuit's Decisions Applying Pearce, Blackledge and Bordenkircher.

In several cases, the Court of Appeals for the Ninth Circuit has applied *Pearce* and *Blackledge* to dismiss indictments which the government obtained after a defendant rejected the government's demands that he yield an important right. *United States* v. *Ruesga-Martinez, supra* (right to jury trial on a misdemeanor complaint) and *United States* v. *DeMarco, supra* (right to have indictment transferred to the defendant's home district for trial).

Recently, the Ninth Circuit applied the *Pearce-Blackledge* prophylactic rule again and also held that the narrow "plea bargaining" exception to *Pearce* and *Blackledge*, which this Court delineated in *Bordenkircher*, was inapplicable where an indictment appeared to be retribution for the defendant's exercise of a right other than "the right to plead not guilty." *United States* v. *Groves*, 571 F. 2d 450 (9th Cir. 1978).

In *Groves*, the government obtained an apparently vindictive indictment of the defendant on a marijuana charge after he succeeded in having a cocaine charge dismissed because of the government's failure to comply with the Speedy Trial Act. The government claimed that the

new charge was brought because of the defendant's alleged failure to comply with a plea bargaining agreement. However, the Ninth Circuit held that "[t]he core of the *Blackledge*, *Pearce*, and *Ruesga-Martinez* decisions is that it is the *appearance of vindictiveness*, rather than *vindictiveness in fact*, which controls" 571 F. 2d at 453 (emphasis in original), and that "the government failed to overcome the appearance of vindictiveness so manifest on the face of this record." 571 F. 2d at 455.

In *Groves*, the Ninth Circuit recognized—as the Fourth Circuit in the instant case did not—that a "unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right" *other than the right to plead not guilty* was not "plea bargaining" within the meaning of *Bordenkircher* (571 F. 2d at 455):

> "There, [in *Bordenkircher*,] the Court carefully contrasted increased charges resulting from a failure to reach a plea bargaining agreement with those initiated in response to a defendant's assertion of his legal rights. The Court held that a 'unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right . . . [was] "very different from the give-and-take negotiation common in plea bargaining between the prosecution and the defense . . ."' . . . Inasmuch as the government sought unilaterally and vindictively to punish the appellant for assertion of his legal rights, *Bordenkircher* is a support rather than a bar to the reversal of this conviction." 571 F. 2d at 455.

In the present case, just as in each of the Ninth Circuit cases, the right which Litton refused to yield was not "the right to plead not guilty" and in the present case, just as in each of the Ninth Circuit cases, no "plea bargaining"

was involved. But the Fourth Circuit, in direct conflict with the Ninth Circuit's *Groves* decision, held that a prosecutor's retaliation against a defendant for insisting on an entirely different right—here, Litton's right to the finality of the civil ASBCA award—was "plea bargaining" and therefore permissible under *Bordenkircher*. The Fourth Circuit's unreasonable application of *Bordenkircher* herein creates a conflict between the Fourth and Ninth Circuits which only this Court can resolve.

E. The Decision Below Constitutes the First in Which Actual Vindictiveness in Prosecution Has Been Condoned.

The cases which have reached this Court and the Court of Appeals for the Ninth Circuit involving vindictiveness have dealt with the *appearance* of vindictiveness, and not actual vindictiveness, only because of difficulties of proof. In the present case the District Court made findings of actual vindictiveness—findings which are fully supported by the record and which the Court of Appeals never held to be clearly erroneous. The District Court held:

> "[T]he government retaliated—made good its threat —by producing an indictment." (A6.)

And further:

> "The perception of the grand jury as an intimidatory device was implicit in the Assistant United States Attorney's statement [that "Litton bought this indictment.']" (A7 n. 3.)

And further:

> "[T]here is present deliberate and disingenuous conduct." (A10.)

What the District Court found, then, was that the ordinary discretion of the prosecutor was, in this case, motivated by actual vindictiveness against Litton, arising from Litton's refusal to concede an advantage to the government in its civil case. The Court of Appeals apparently concluded that such actual vindictiveness was irrelevant, so long as "plea bargaining" was, in its view, involved. This is not only wrong, it makes this case more serious than either *Pearce* or *Blackledge*, which dealt only with the *appearance* of vindictiveness. By definition, actual vindictiveness must necessarily taint any aspect of the criminal process—including plea bargaining.

CONCLUSION.

The government cannot be permitted to threaten a presumptively innocent defense contractor with an unfounded indictment to secure a monetary advantage. It cannot be allowed to mask such extortion under the label of "plea bargaining" at a time when it admittedly does not have a prosecutable case for *any* crime. And an indictment produced because of this actually vindictive motivation cannot be allowed to stand. Accordingly, Litton respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that three copies of this Petition for Writ of Certiorari were served by first class mail, postage prepaid, on William B. Cummings, Esquire, counsel for the respondent, on May 26, 1978. I further certify that all parties required to be served have been served.

/s/ Robert W. Maris
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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 77-70-A

UNITED STATES OF AMERICA

v.

LITTON SYSTEMS, INC., d/b/a INGALLS
NUCLEAR SHIPBUILDING DIVISION,
Defendant.

MEMORANDUM OPINION AND ORDER.

On April 6, 1977 a grand jury of this district, Alexandria Division, returned a one-count indictment charging the defendant with presenting a false and fraudulent claim to the United States Navy on or about May 26, 1972, in violation of 18 U. S. C. § 287.[1] That claim arose from a contract awarded the defendant, Litton Systems, Inc., d/b/a Ingalls Nuclear Shipbuilding Division (Litton) by the United States Navy in June, 1968, for the construction of three nuclear attack submarines. The defendant has filed, among others, a motion to dismiss the indictment on the ground of governmental misconduct in connection with the grand jury proceedings preceding the indictment.

1. "§ 287. *False, fictitious or fraudulent claims*

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

During the course of performance of the contract there were certain delays which resulted in increased costs of construction. After some preliminaries, on May 26, 1972, Litton forwarded to the Navy data supporting a previously submitted price proposal (the claim) to recover that portion of the cost increase attributable to the government. When no resolution of the matter could be reached, Litton appealed to the Armed Services Board of Contract Appeals (ASBCA) claiming a total reimbursement of approximately $30,000,000. The hearing before the ASBCA began on October 30, 1973, and concluded on March 7, 1974. On April 16, 1976, the ASBCA issued its decision awarding Litton over $16,000,000 on its claim. It is the May 26, 1972 claim which was the subject ultimately of the proceedings before the ASBCA and which the present indictment charges violated 18 U. S. C. § 287.

On March 17, 1975, after the conclusion of the hearing before the ASBCA but over a year prior to the time that body issued its decision, a grand jury was impanelled by this Court to investigate whether a crime had been committed by Litton in the submitting of the claim. After eighteen months this grand jury expired by operation of law [Fed. R. Crim. P. 6(g)] on September 17, 1976, without having returned an indictment against Litton. The decision of the ASBCA in the meantime had been filed on April 16, 1976, and Litton and the government on or about May 14, 1976 jointly agreed not to file motions for reconsideration of that decision.

On September 9, 1976, just prior to the expiration of the grand jury's term, at a meeting between the Assistant United States Attorney in charge of the case and attorneys for Litton, the former offered to terminate the investigation and not seek an indictment if Litton would agree to allow the proceedings before the ASBCA to be reopened and to permit evidence gathered by the grand jury to be

presented to the ASBCA. A similar offer was made on September 14, 1976. Litton rejected the offer on both occasions and subsequently by letter dated November 1, 1976.

The government characterizes the overtures in this way:

> On September 7, 1976, AUSA Dunham initiated contact with Vincent Fuller, then representing Litton, and suggested a meeting which occurred on September 9, 1976 in the offices of the United States Attorney. At this meeting, Fuller was advised that the Grand Jury investigation indicated that the claim had been premised on an erroneous basis and decided by the ASBCA without benefit of all the facts. Fuller was further advised that, although the Grand Jury was expiring, further investigation would be required to determine whether Litton or any officer or employee of the company had deliberately allowed the claim to be premised on a factually erroneous basis, that is, it was made clear to Fuller that the primary open avenue of inquiry was the issue of criminal intent.
>
> Dunham explained to Fuller that he saw a possible way to resolve the intent issue in Litton's favor and thus eliminate further expenditure of resources by both Litton and the Government. Dunham stated he was reluctant to discuss it without assurances first being made that the discussions would not be taken as a threat or treated as other than a good faith attempt to resolve the intent question. Fuller agreed with the ground rules laid out and encouraged the dialogue to ensue. He said he would terminate the talks at any time he deemed them inappropriate or improper. The suggestion was then made by the Assistant United States Attorneys that, assuming all

the details could be worked out, the ASBCA hearing be reopened with both sides having access to the investigation materials.

* * *

The suggested meeting commenced on September 14, 1976. Present were Lintz, Fuller, and Wilson, another retained criminal counsel, and Dunham, Fisher and Kibby, Assistant United States Attorneys. It was again unequivocably stated at the meeting's outset that before any discussion could ensue, there had to be assurances from Litton's side of the table that, at some later point in time, the discussions would not be used as a basis for an allegation of duress, threat, intimidation or other intimation of improper conduct on the part of the prosecution. Fuller, Wilson and Lintz all indicated they understood that the discussions were being had only with this mutual understanding. The Government then fully outlined the evidence developed during the Grand Jury investigation establishing that Litton's claim was false. This was followed by an in depth discussion participated in by all persons present on the mechanics that would be utilized to get a 6(a) Order and reopen the ASBCA proceedings. The meeting terminated on a cordial note.

Government's Response, pp. 4-6.

Following the expiration of the grand jury's term, the United States continued its own investigation of the matter and it asserts that this investigation revealed evidence of criminal intent which had been unavailable to the eighteen-month grand jury. Consequently, according to the government, it presented evidence to an existing grand jury which had been impanelled on July 19, 1976 in connection with inquiries of other matters. This evidence was presented at various times during the period February 28, 1977 through March 10, 1977.

On March 11, 1977, perhaps sensing an impending indictment, Litton offered by letter to do what had been suggested the previous September by government counsel. By then, however, the matter had progressed too far. Deputy Attorney General Thornburg had requested on January 17, 1977, that the matter be presented to a new grand jury for the purpose of seeking an indictment, and on February 7, 1977 the Attorney General personally approved prosecution of the case. Before the grand jury two special agents of the FBI summarized the matters that had been presented to the previous grand jury. Counsel represented at argument on this motion that the summary and presentation of additional evidence took approximately six days. The previous grand jury, during its eighteen-month tenure, had considered the matter for a total of approximately twenty-five days.

It appears from the uncontroverted affidavit of defense counsel that at a meeting held on April 19, 1977, the Assistant United States Attorneys stated that there had been no requirement of the two agents:

> 1. To read and review all of the matters occurring before the eighteen-month investigating grand jury;
>
> 2. To restrict their summary presentations to those matters occurring before the eighteen-month grand jury;
>
> 3. To distinguish between hearsay and personal knowledge; and
>
> 4. To distinguish between matters occurring and not occurring before the eighteen-month investigating grand jury.

At the same meeting, one of the Assistant United States Attorneys involved in the case stated to counsel for the defendant that "Litton bought this indictment."

° ° ° °

No matter how benign a view of the matter is urged by the government, the truth of it is that the government wanted a "second bite at the apple" in its controversy with Litton over the issue of reimbursement; that it used the implied threat of indictment in an effort to obtain reconsideration of what Litton, presumptively innocent, was otherwise entitled to; and that when Litton, as was its right, refused to forego that entitlement, namely, the finality of the civil award, the government retaliated—made good its threat—by producing an indictment. This is a serious abuse of prosecutorial power.

The government's position is that during the investigation before the first grand jury incriminating evidence was uncovered which led the prosecutors to believe that the claim as submitted to the ASBCA was false, although there was no evidence before the grand jury of criminal intent; that their attempt to resolve the matter without an indictment was motivated by a desire to see that the ASBCA had the entire picture—to let Litton prove its innocence if it had nothing to hide; and that the deal had many attractive features from Litton's point of view.[2] This misses the point of its misconduct. Had the bargain been proposed *after* indictment it arguably could be justified, but what is reprehensible here is the *threat* to use, as *well* as the actual use of, the grand jury as a bargaining

2. The government points out that the bargain as offered could possibly have resulted in Litton's obtaining a higher award and the government could not assert fraud as a defense to the claim before the Court of Claims. The "bargaining," however, was hardly at arm's-length. With a grand jury investigation in the background, the United States enjoyed substantial leverage in making its proposal.

tool in an effort to upset the final civil award to which Litton was entitled.[3] Rather than ". . . security against hasty, malicious and oppressive prosecution; . . . standing between the accuser and the accused. . . . ," *Wood v. Georgia,* 370 U. S 375, 390 (1962), the grand jury here was used to formulate a ". . . charge . . . dictated by an intimidating power . . ." *ibid.*

The government's analogy of the procedure followed here to that followed in a Pretrial Diversion Program is misplaced. The Pretrial Diversion Program is a judicially sanctioned plan designed for rehabilitation of persons *who admit their guilt,* without formal charges being brought. Here, not only at a time when the defendant was protesting its innocence, but at a time when the government, according to its brief,[4] had no evidence of criminal intent,

3. The perception of the grand jury as an intimidatory device was implicit in the Assistant United States Attorney's statement at the April 19, 1977 meeting. In his opinion, by refusing to agree to a reconsideration of the award it had gained through the ASBCA, Litton had brought the indictment upon itself.

4. "The investigation had established beyond peradventure of a doubt that the claim was false. The only remaining issue was the presence or absence of criminal intent. Although the net effect of what was done in the company's name was egregious, the evidence of wrongdoing by particular individuals was not then of a character to convince the Department of Justice that any *individuals* should be indicted, although certain individuals were being considered as possible targets. The individuals considered as potential defendants with the exception of shipyard president, Ned Marandino, were low to middle level management, people in positions sufficiently significant enough to bind the corporation with their conduct but as to whom no direct benefit could be discerned as having been derived from participating in the assembly of a false claim. The only direct beneficiaries of the wrongful conduct, assuming intent could be established, was the company and the highest echelons of its management. But there was no evidence that these individuals had ever read what had been submitted in Litton's name. After review of the matter in the Department of Justice, the company itself appeared to be the foremost criminal target assuming that additional evidence on willfulness could be developed and obtained through further investigation." Government's Response, pp. 3, 4.

the investigating grand jury was used as a bargaining tool to effect a reopening of the matter before the ASBCA.

Nor does the claim of waiver by the United States validate its conduct in this case. One need only put himself in the shoes of counsel for a putative defendant being investigated by a grand jury to recognize how little choice such counsel would have when approached by an Assistant United States Attorney with a proposition contemplating termination of the investigation. What prudent lawyer would not have acceded readily to the stipulation that any discussion would not be considered fraud or coercion? But the exaction of such a condition does not make the circumstances less coercive, and it is no comfort to the government here.

At least one circuit court of appeals, in the exercise of its supervisory power, has directed a dismissal of an indictment returned solely on hearsay testimony in an extreme case, e.g., *United States v. Estepa*, 471 F. 2d 1132 (2nd Cir. 1972). This Court, however, is unwilling to dismiss the indictment on that ground in view of the unequivocal and as yet unrepudiated language in *Costello v. United States*, 350 U. S. 359 (1956), especially since here there was evidence other than the summary presented to the indicting grand jury. In the case of *In re Grand Jury Investigation of Banana*, 214 F. Supp. 856 (D. Md. 1963), cited by the defendant, the Court condemned the practice followed here, but the action there was the prohibition of future conduct rather than a dismissal of the indictment.

The appearance and summation testimony before the grand jury of the two agents is relevant, however, to the issue of the misconduct of the United States Attorney's Office. One need not be a skeptic to question the impartiality of a presentation which persuaded a grand jury that neither had heard nor seen the previous witnesses or documents to do within ten days what the prior grand jury had not seen fit to do after twenty-five days of evidentiary hearing over an eighteen month period. This is further evidence of the cynical view that has been taken of the grand jury in this case, namely, as a mere echo of the office of the United States Attorney.

The government's suggestion to *reopen* the matter before the ASBCA ominous when considered with the fact that after the Board's decision was rendered but while the first grand jury was still in existence and prior to the September overtures to the defendant by the United States Attorney's Office, the government caused subpoenas to be served on the judge who presided at the ASBCA hearing, and the Chairman of the ASBCA (who was one of the four concurring judges in the ASBCA decision). They did not actually testify before the grand jury, but on or about May 21, 1976, a Special Assistant United States Attorney, and on or about July 21, 1976 two FBI agents interviewed the presiding judge relative to whether and to what extent matters disclosed before the grand jury had been considered by the ASBCA in its decision. The extent to which such matters were revealed in the interview is not shown by the record; however, no order allowing disclosure was obtained as provided for by Fed. R. Cr. P. 6(e). Such activity could only carry the potential for depreciation of the ASBCA's impartiality and vitiation of its decisions in any reopened claim or in future claims involving the defendant.[5]

It is entirely possible that upon trial Litton would be found guilty of presenting a false or fraudulent claim; however, when prosecutorial discretion is abused, as here, dismissal of the indictment as a prophylaxis is warranted. *Cf. United States v. DeMarco*, 550 F. 2d 1224 (9th Cir. 1977). While the circumstances here do not carry the procedural

5. It is represented that Litton has pending before the ASBCA claims totalling in excess of $900,000,000.

"due process implications" found to support the dismissal in *DeMarco,* the Court has no difficulty discerning abridgment of the defendant's substantive due process rights in permitting the government's conduct. The determination and review of civil disputes such as the one at the core of this prosecution is governed by an established statutory and regulatory scheme. Allowing the government to circumvent the finality otherwise accorded the administrative resolution of contract disputes by threatening criminal prosecution in substance abrogates the private party's right to hold the government to its own rules. At the very least the Court is warranted in exercising its supervisory power over federal prosecutors where there is present deliberate and disingenuous conduct.

The foregoing resolution of the matter renders it unnecessary to face the issue presented by the other motion on which the Court reserved decision, namely, the defendant's motion for a change of venue under Fed. R. Cr. P. 21(b). Should the Court now or in the future be required to face the issue it would be inclined to grant the motion. The indictment was presented in this district because the allegedly false claim was presented to the contracting officer whose office by mere happenstance is located here. The failure of Litton to request an on-site hearing in the civil administrative appeal proceeding which it initiated ought not to foreclose it from asserting its right to be tried criminally elsewhere if the requirements for a 21(b) transfer otherwise exist. And they do. *Platt v. Minnesota Mining & Manufacturing Co.,* 376 U. S. 240 (1964). The defendant's offices and shipyard, where the work which formed the basis of the claim was performed, are located in Mississippi. The numerous (approximately 69 according to the defendant) defense witnesses for the most part are located there, and the inconvenience inherent in requiring them to come to Virginia for what may be

a lengthy trial is readily apparent. The events likely to be in issue also occurred in Mississippi and the documents and records involved in the case are there. Some disruption of Litton's business is bound to take place if its witnesses have to be this far from its place of business. While the Court cannot at this time determine whether a view of the location is necessary, this has been done in ASBCA proceedings other than those involved here and that body apparently found it helpful in its resolution of the matters in controversy. The expense of the trial for the defendant undoubtedly would be greater if the trial was conducted in Virginia rather than Mississippi; such expense would include, among other things, the employment of local counsel as well as payment for travel and maintenance for defendant's Mississippi counsel[6] and witnesses. The only factor weighing in favor of retaining the case in this district and division is convenience for the Department of Justice. This is not entitled to a great deal of weight. The presumption that the proper location for trial is the place of indictment and of the technical commission of the alleged fraud has been overcome. The above discussion illustrates that for the convenience of the parties and witnesses and in the interest of justice, the case most appropriately should be prosecuted in the Southern District Mississippi. The latest statistics from the Director of the Administrative Office of the United States Courts show that district as having a much lighter criminal docket than this district, an expeditious handling of its criminal docket and a docket no more congested than the one here.

Since argument on May 20, 1977 of the motions discussed in this Memorandum, the Court has received daily and sometimes twice daily communications from counsel

6. A transfer would not decrease all expenses for counsel in view of the appearance of attorneys from Philadelphia, but it would eliminate some duplication of travel expenses.

on both sides in the form of letters and affidavits. The Court has examined and considered the matters raised in these addenda and believes them to be irrelevant to its decision. They do not alter the Court's judgment.

For the foregoing reasons the indictment is dismissed; and it is so ordered.

Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia

May 25th, 1977

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2191

UNITED STATES OF AMERICA,
Appellant,

v.

LITTON SYSTEMS, INC., d/b/a INGALLS NUCLEAR SHIPBUILDING DIVISION,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
ALBERT V. BRYAN, JR., DISTRICT JUDGE.

Argued February 7, 1978 Decided April 4, 1978

Before WINTER, BUTZNER and RUSSELL, *Circuit Judges*

William B. Cummings, United States Attorney (Frank W. Dunham, Jr., Assistant United States Attorney, Joseph A. Fisher, III, Assistant United States Attorney and Sara S. Beale and Elliott Schulder, Department of Justice on brief) for appellant; Bruce W. Kauffman (David H. Pittinsky, Stephen J. Mathes, Lawrence D. Berger, Dilworth, Paxson, Kalish, Levy & Kauffman; W. W. Koontz, John S. Stump, Boothe, Prichard & Dudley on brief) for appellee.

BUTZNER, *Circuit Judge:*

The United States appeals from an order of the district court dismissing a one count indictment against Litton Systems, Inc., because of prosecutorial misconduct during pre-indictment negotiations between the parties. We vacate the order of dismissal and remand the case for further proceedings.

I

In 1972 the Ingalls Nuclear Shipbuilding Division of Litton Systems, Inc., filed a claim with the Navy for approximately $30 million in connection with a contract to construct nuclear submarines. The company appealed an adverse decision by the Navy contracting officer to the Armed Services Board of Contract Appeals, which in April, 1976, awarded Litton more than $16 million. Both parties agreed not to ask for reconsideration of the award.

In March, 1975, after the Board had concluded its hearings but before it announced its decision, the district court impaneled a federal grand jury to investigate Litton's claims against the Navy. At a conference with the assistant United States attorneys handling the investigation, Vincent J. Fuller, counsel for Litton, inquired whether there might be an alternative to the criminal investigation. One of the assistants responded that the government did not presently have enough evidence to make such a decision. Fuller also asked for advance notice if they decided to seek an indictment because he wanted a chance to attempt to dissuade the government from proceeding.

Toward the end of the grand jury's term, the government lawyers concluded that although the falsity of Litton's claims could be proved, the evidence of criminal intent was insufficient to establish guilt beyond a reasonable doubt. They therefore decided to let the term expire

without seeking an indictment and to continue the investigation, exploring several promising leads that would enable them to prosecute the corporation rather than individual employees. About the same time, an attorney paid by Litton to represent employees before the grand jury suggested to Frank W. Dunham, Jr., the Assistant United States Attorney in charge of the investigation, that someone should talk to Fuller about alternatives to criminal prosecution. Dunham knew that this attorney communicated frequently with Litton's counsel and, recalling Fuller's earlier requests, he decided to confer with Fuller.

On September 9, 1976, Dunham explained to Fuller that the government had evidence that Litton's claim was false but that it had not yet found sufficient proof of willfulness and criminal intent. He told Fuller that no indictment would be returned but that the investigation would have to continue. Dunham said that he saw a possible way to resolve the controversy but was "reluctant to discuss it without assurances first being made that the discussions would not be taken as a threat or treated as other than a good faith attempt to resolve the intent question." Fuller agreed to this stipulation, encouraged Dunham to proceed, and said that he would terminate the talks any time he deemed them inappropriate or improper. Dunham then proposed that:

> A. Both Litton and the Navy would petition to reopen the [Armed Services Board of Contract Appeals] proceeding;
>
> B. Both Litton and the Navy would join in application to the Court for a [Federal Rule of Criminal Procedure] 6(e) Order to permit inspection by Litton and the Navy of grand jury materials for use by both parties in the reopened [Board] proceedings;

C. The Government would not assert fraud as a defense in the Court of Claims to any final judgment for Litton in the [Board] nor would it initiate any civil fraud suits;

D. The criminal investigation would be terminated.

Elaborating on this outline, Dunham emphasized that, upon hearing whatever additional evidence either side wanted to introduce, the Board could adjust its award up or down or let it stand.

Fuller found the proposal reasonable, describing it as a "breath of fresh air," and a few days later he advised Dunham that Litton was interested in discussing it. At a second meeting, Dunham disclosed the evidence of the falsity of Litton's claim, and the parties discussed the mechanics of reopening the proceeding before the Board and getting the corporate and governmental approvals necessary to implement the plan. Two days later, however, Glen McDaniel, the chairman of Litton's executive board, who had not conferred with the government attorneys, met with Deputy Attorney General Harold R. Tyler, Jr., complaining that Litton was being threatened with indictment if it refused to reopen the Board proceedings. Fuller, upon learning of this complaint from Dunham, agreed that it violated their understanding concerning discussion of the proposal and offered to advise the Deputy Attorney General of this. After inquiring into the settlement negotiations, the Deputy Attorney General wrote Litton that he found nothing improper in them. He suggested that Litton's lawyers contact the government attorneys if further negotiations were desired.[1] At Litton's

1. The Deputy Attorney General's letter of October 7, 1976, to McDaniel stated:

This letter is in response to the concerns you raised at our meeting of September 15, 1976. (Cont'd. on p. A17.)

request, the parties again conferred, but on November 1, 1976, Litton rejected the proposal.

The government's investigation continued throughout the final months of 1976. On January 17, 1977, Assistant Attorney General Richard Thornburg requested the United States Attorney to present the matter to a new grand jury for the purpose of seeking an indictment. Attorney General Griffin Bell approved prosecution of the case on February 7, 1977.

Dunham honored Fuller's request and advised him of the decision to indict. In response, Litton expressed a desire to avoid prosecution and to return the matter to the Board along the lines of the government's proposal. Dunham indicated that the prosecutors were now opposed to such a disposition but that he would forward any proposal from Litton to the Department of Justice for review. At Litton's request, the Attorney General, his principal assistants for matters pertaining to criminal prosecutions and fraud, and the United States Attorney and his assistants met with Fuller, McDaniel, and two members of Litton's board of directors. At the conclusion of this conference the Attorney General found no justification for terminating the

1. (Cont'd.)

I have met with those in the Department of Justice who have been handling the investigation of Litton Industries. I see no compelling evidence that the settlement discussions entered into between Litton and the Government were anything other than good faith attempts, on both sides, to explore freely all possible avenues by which this investigation could be brought to a conclusion satisfactory to all concerned. The Department lawyers involved in these talks, I am told, made clear to Litton's lawyer, Mr. Fuller, at the outset of the discussions that they do not possess authority to settle without approval from their superiors in the Department; this is in fact the case in all such settlement discussions.

I would suggest that your outside counsel, Mr. Fuller, contact our Department attorneys with a view to resuming these exploratory discussions, so that this matter may again proceed on course.

prosecution. The next day the grand jury returned the indictment. Litton, represented by new counsel, subsequently moved to dismiss it.

The district court granted Litton's motion. It found that the government's proposal constituted an implied threat of indictment designed to coerce Litton into giving up its award and that, when Litton refused, the government retaliated by obtaining the indictment. The district court acknowledged that the bargain could arguably have been justified if the government had made its proposal after indictment. Nevertheless, it held that the government's use of the grand jury as a bargaining tool to upset the Board's award violated Litton's substantive due process right to have the finality of its civil claim attacked only within the statutory and regulatory schemes established for that purpose. Although Fuller did not testify, the court discounted his waiver of objections on the ground that the situation was so inherently coercive that no prudent attorney could have refused to entertain the proposal.

II

This case is governed by the principles expressed in Bordenkircher v. Hayes, 98 S. Ct. 663 (1978). The district judge, it should be noted, did not have the benefit of that opinion, for it was published after he granted Litton's motion to dismiss the indictment. Hayes, a state prisoner, had been indicted for uttering a forged check. During plea negotiations, the prosecutor offered to recommend a five year sentence if Hayes would plead guilty; if Hayes would not plead guilty, the prosecutor threatened to indict him as a recidivist, for which the mandatory penalty was life imprisonment. Hayes refused the offer, and the prosecutor obtained the second indictment. On his plea of not

guilty, Hayes was convicted of the charges in both indictments and sentenced to imprisonment for life.

Hayes—like Litton—relied primarily on North Carolina v. Pearce, 395 U. S. 711 (1969), Blackledge v. Perry, 417 U. S. 21 (1974), and their progeny. These cases hold that after a defendant has succeeded in having his initial conviction vacated, the due process clause protects him from the vindictive imposition of an increased sentence on retrial and from fear of retaliation by either a judge or prosecutor. The Supreme Court, however, refused to apply these cases to Hayes's situation. The Court recognized that the prosecutor's threat to procure another indictment was designed to deter Hayes from exercising his right to plead not guilty. It emphasized, however, "that the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right, . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." Bordenkircher v. Hayes, 98 S. Ct. at 667-68. It concluded that "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecutor's offer." 98 S. Ct. at 668. Applying these principles, the Court sustained Hayes's conviction.

Litton's situation is essentially like Hayes's. Although the prosecutor did not threaten to indict Litton if it rejected the proposal, he said that the fraud investigation would be continued to determine whether Litton should be indicted. Litton's Board award was not final; even if Litton rejected the proposal, the government could attack the award for fraud in the Court of Claims. 28 U. S. C. § 2514; *see* S & E Contractors, Inc. v. United States, 406 U. S. 1, 15-17 (1972). Nevertheless, Litton was asked to forego a right as a price for the government's termination

of the investigation. Specifically, Litton was asked to give up its right to bar the Board's reconsideration of its claims.

The district court did not find that Deputy Attorney General Tyler, Assistant Attorney General Thornburg, or Attorney General Bell, who made the critical decisions in this case, were vindictive or retaliative. The absence of such a finding is proper because the evidence would not support a contrary ruling.[2] Instead, the district court concluded that it was unlawful for the prosecutor to use the implied threat of indictment to deter Litton from exercising a legal right. But this is precisely what *Hayes* allows a prosecutor to do when he is bargaining with the potential defendant of a threatened indictment.

Litton protests that *Hayes* is distinguishable because the government lacked proof that Litton had committed a crime when the prosecutor offered his proposal. We do not believe this distinction is significant. The court of appeals granted Hayes a writ of habeas corpus in part because the prosecutor had known about Hayes's recidivism when he obtained the initial indictment charging uttering a forged check. This prior knowledge, the court of appeals reasoned, justified a conclusion that vindictiveness alone motivated the prosecutor in obtaining the subsequent indictment. *See,* Hayes v. Cowan, 547 F. 2d 42, 44 (6th Cir. 1976). The Supreme Court's recognition of the prosecutor's prior knowledge clearly put to rest the court of appeals's notion that this factor supported granting the writ. Indeed, in Blackledge v. Perry, 417 U. S. 21, 29 n. 7 (1974), the Court explained that a prosecutor's inability to proceed on a more serious charge at the time

2. Litton insists that an Assistant United States Attorney's remark—"Litton bought this indictment"—conclusively demonstrates vindictiveness. There is no evidence, however, that the Assistant, who was not in charge of trying the government's case, reflected the views of the officials in the Department of Justice who were responsible for instituting the criminal prosecution.

of the initial indictment would indicate that a subsequent indictment was not motivated by vindictiveness. Accordingly, we cannot accept Litton's argument that *Hayes* is inapplicable. We do not believe that the Court intended to confine plea bargaining to those situations where the prosecutor possesses irrefutable proof of the most serious crime for which a defendant is ultimately prosecuted. A prosecutor's bargaining position should not be so circumscribed. This is not to say, however, that a prosecutor can employ deceptive tactics about the strength of his case to induce a bargain.

In this case the government did not engage in any deception. The attorney in charge of presenting the case to the grand jury candidly told Litton's attorneys that while the government had proof of false claims, it had not yet obtained sufficient evidence of willfulness and criminal intent to warrant prosecution. The government's lack of knowledge about criminal intent and the possibility of further investigation were factors that Litton could weigh in deciding whether to accept the government's proposal. The prosecutor's candor in revealing the weakness of the government's case dispels any notion of vindictiveness.

Litton also contends that the rejection of its belated acceptance of the government's proposal manifests vindictiveness and renders *Hayes* inapplicable. We find no merit in this argument. *Hayes* does not require a prosecutor to keep an offer of a bargain open indefinitely after it has been rejected. Again, we believe that a prosecutor's bargaining position should not be so closely circumscribed. There are many reasons why a prosecutor should be permitted to put a rejected offer aside and proceed with the development of the government's case. Certainly, after new evidence of the defendant's wrongdoing has been uncovered, prosecutors should not be bound by an

offer rejected months before when the case presented quite a different profile.

Finally, *Hayes* cannot be distinguished because it dealt solely with criminal proceedings while this case presents a mixture of civil and criminal litigation. In *Hayes* the prosecutor's threat did not violate the due process clause even though life imprisonment was at stake if Hayes rejected the offer and subjected himself to indictment. We cannot say that the government violated the due process clause in this case where rejection of its offer would not subject anyone to imprisonment and the issues are primarily monetary. The prosecutor did not even ask Litton to forego its award but only proposed that the Board should be authorized to reconsider it in light of information not previously available. Moreover, the prosecutor did not advance the proposal as a means of leverage against an unrelated claim. The material elements of both the civil and criminal proceedings were closely interwoven, and the proposal was an effort to resolve all facets of an essentially single controversy.

Therefore, applying the principles expressed in *Hayes*, we conclude that the government did not abridge Litton's right to substantive due process.

III

Litton also urges us to apply the familiar rule that the judgment of a court can be defended on any ground consistent with the record. Massachusetts Mutual Life Ins. Co. v. Ludwig, 426 U. S. 479 (1976); *see* C. Wright, Federal Courts 523 (3d ed. 1976). It therefore seeks affirmance of the dismissal of the indictment on grounds rejected by the district court. We agree with the district court that neither of these grounds warrants dismissal.

In May, 1976, after the Board announced its decision, a government attorney who was looking for a document

relating to the Litton claims contacted Administrative Law Judge Bird, who had presided over the Litton proceedings. Both the government and Litton had been unable to find the document, and since Judge Bird's opinion referred to it, a subpoena had been issued requesting his copy. Judge Bird did not have the document either. The attorney showed Judge Bird a later version of the document and asked whether he had considered it in reaching his decision.

In July, 1976, a federal agent interviewed Judge Bird and Judge Solibakke in an attempt to determine whether three documents submitted by Litton which the government's investigation suggested were inaccurate had been material to the decision of the board of contract appeals. Judge Bird responded that, since two of the documents in question were cited in his opinion, they were material to it, while the third, which was not cited, probably was not material. The agent who conducted the interview stated in his affidavit that he did not reveal any of the proceedings of the grand jury to the judges and that he had acquired the basis for all of his comments independently of the grand jury proceedings.

In September, 1976, the grand jurors requested a final session in order to hear testimony from a group of government officials, including Judge Bird and Judge Solibakke. The prosecutor told the court that, while he wanted to accommodate the grand jury, he believed the testimony of these officials would not be relevant, and therefore he would not request issuance of the subpoenas. The Court directed that the subpoenas be issued, but the two judges never testified because the term expired before they could be heard.

We conclude that these contacts present no grounds for dismissing the indictment against Litton. Initially, we

see no basis for finding governmental misbehavior in the May, 1976, communication during the search for the missing document or in the issuance of the subpoenas in August, 1976, by the district court. As for the allegations that grand jury materials were improperly revealed during the May and July contacts, we note that the district court made no finding that materials were actually revealed. But even assuming that they were, the proper remedy would not be dismissal of the indictment. United States v. Hoffa, 349 F. 2d 20, 43 (6th Cir. 1965), *aff'd on other grounds,* 385 U. S. 293 (1966); United States v. United States District Court, 238 F. 2d 713, 721 (4th Cir. 1956).

Litton also complains of the government's use of federal agents to summarize for the second grand jury the evidence heard by the first. But, citing Costello v. United States, 350 U. S. 359 (1956), the district court declined to rule that the use of hearsay evidence required dismissal of the indictment, especially since the indicting grand jury heard other evidence. After examining the record, we agree that nothing in the form or content of the government's presentation requires dismissal of the indictment.

The judgment is vacated, and the case is remanded for further proceedings.

JUDGMENT

(Filed April 4, 1978)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2191

UNITED STATES OF AMERICA,
Appellant,

vs.

LITTON SYSTEMS, INC., d/b/a INGALLS NUCLEAR SHIPBUILDING DIVISION,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated. The case is remanded to the United States District Court for the Eastern District of Virginia, at Alexandria, for further proceedings consistent with the opinion of this Court filed herewith.

WILLIAM K. SLATE II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2191

UNITED STATES OF AMERICA,
Appellant,
versus
LITTON SYSTEMS, INC., d/b/a INGALLS NUCLEAR SHIPBUILDING DIVISION,
Appellee.

ORDER DENYING PETITION FOR REHEARING.

(Filed April 27, 1978)

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.

Upon consideration of the appellee's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Butzner for a panel consisting of Judge Winter, Judge Butzner, and Judge Russell.

For the Court,

WILLIAM K. SLATE, II
Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal No. 77-70-A

UNITED STATES OF AMERICA
v.
LITTON SYSTEMS, INC.,
d/b/a Ingalls Nuclear Shipbuilding Division

INDICTMENT.

(Filed in Open Court, April 6, 1977)

JULY 1976 TERM—At Alexandria.

THE GRAND JURY CHARGES:

A. That all times material herein unless otherwise specified:

1. LITTON SYSTEMS, INC., hereinafter referred to as LITTON, was engaged in the construction of combatant ships for the United States Department of the Navy through its Ingalls Nuclear Shipbuilding Division located in Pascagoula, Mississippi hereinafter referred to as INGALLS.

2. The United States Department of the Navy, hereinafter referred to as the Navy, was a department and agency of the United States responsible for the construction of ships and vessels for the defense of the United

States and under the National Defense Program. The Navy carried out its responsibility for the construction of ships and vessels for the defense of the United States by awarding contracts to private sources capable of said construction, of which INGALLS was one.

3. On or about the 25th day of June, 1968, the Navy entered into Contract No. N00024-68-C-0342, hereinafter referred to as "the contract", with INGALLS on behalf of LITTON for the construction of three nuclear submarines.

4. a. On or about November 30, 1970, LITTON submitted "Extended Schedule Proposal, Contract No. N00024-68-C-0342," hereinafter referred to as "the claim", to the Navy in the Eastern District of Virginia, asserting that the Navy caused certain increased costs experienced, and to be experienced, in the course of performance of the contract. Said claim consisted of three volumes, the first volume containing a 42 page narrative which is attached hereto as Attachment A.

b. In order for INGALLS to receive the relief sought, INGALLS had to establish not only that the increased costs were incurred, but also that the costs incurred were a result of Navy actions subsequent to contract award rather than being caused by underbidding, inefficiencies or other reasons attributable to INGALLS, and not the Navy.

c. Attachment A is INGALLS' version of the facts alleged to establish that increased costs allegedly incurred were caused by Navy actions subsequent to contract award.

5. On or about the 15th day of December, 1971, in the Eastern District of Virginia, LITTON submitted and caused to be submitted to the Navy, revisions to the claim

including revised pages numbered 24, 26, 33, 34, 35 and 42 to the aforesaid 42 page narrative. The revised pages are attached hereto as Attachment B.

6. On or about the 25th day of May, 1972, in the Eastern District of Virginia, LITTON submitted and caused to be submitted to the Navy, the final revision to the claim; said final revision included and incorporated by reference, among other things, Attachment A as revised by Attachment B. INGALLS certified the accuracy of the final revision of the claim, which is attached hereto as Attachment C.

7. Attachment A as added to and modified and supplemented by Attachments B and C alleges in part and in essence that:

a. Hull structural steel was to be furnished by the Government, and INGALLS contemplated using the initial pieces in August of 1968.

b. INGALLS prepared an original plan for constructing the submarines under the contract which permitted the performance of all submarine hull structural work in-house.

c. That the Navy decided to extend the contract delivery dates for each ship by approximately 11 months. This changed the delivery of the first ship, the SSN 680, from September 1971 to September 1972.

d. That the Navy asked INGALLS to submit a proposal for increased costs anticipated as a result of the delivery date extension.

e. That INGALLS, after an analysis occurring in late July and early August 1968, responded to the Navy's proposal with two alternatives; the first would delay the

start of any work until August of 1969 and was referred to as the "delay start" plan, while the other would proceed with hull construction as originally planned in August of 1968 but would "stretch out" the latter portion of ship construction, (called outfitting), referred to as the "stretch out alternative", and further that INGALLS indicated that the cost of the "stretch out" alternative would be less and that the Navy requested INGALLS to pursue the latter alternative.

f. That the reason the "stretch out" plan was cheaper, although still more expensive than the bid proposal, was because INGALLS' trained and skilled submarine outfitting personnel could be "rolled over" from some earlier submarines then in process, in the final stages of construction, to the 680 submarines if hull construction work on the 680's had proceeded to a point where it could absorb these workers, whereas if the hull work was substantially delayed, as contemplated by the delay start alternative, these outfitters would have no hull upon which to commence their outfitting work and would, therefore, experience a loss of learning from series production efficiency and layoffs, i.e., it is the cornerstone of INGALLS' position that it could build more cheaply to a September 1971 delivery of the first ship than to a September 1972 delivery, and if building to a September 1972 delivery, it could build more cheaply if hull work were accomplished early and that, whether building to a September 1971 delivery date or September 1972 with hull work accomplished early, INGALLS had available hull manpower and facilities to accomplish the work.

g. In order to provide hull platforms capable of accepting these large numbers of skilled outfitters at the earliest possible point in time, the "stretch out" plan contemplated four month intervals between the hulls during pre-launch hull construction key events instead of six month intervals as planned in the original bid which change resulted in an earlier keel date for the second and third ships.

h. That the fact that the keel date was advanced on the third ship plus the fact that Navy steel would not support the originally planned start fabrication date of August 1968, the earliest start fabrication date supportable being October, 1968, the pre-keel hull structural work, referred to as preassembly work, had to be performed in a more compressed period of time than that contemplated in the original bid.

i. That whereas the "original manufacturing plan" provided for all preassembly work to be performed in an area of the INGALLS yard referred to as the platens, the analysis made as a result of the extension in delivery dates (Paragraph e above) showed that INGALLS did not have platen capacity to perform all the preassembly work in-house and, therefore, INGALLS, in order to carry out the "stretch out" alternative, commenced consideration of farming out some of the preassembly work to another shipyard or other company capable of doing this work.

j. That the two graphs which appear on Page 10 of Attachment A hereto accurately reflect the platen capacity under; (a) the original construction schedule; (b) the stretch out alternative.

k. That as a result of the overloading reflected in the two graphs referred to in Paragraph 7(j) hereof, the defendant elected to subcontract certain portions of the hull structural work at a premium cost, which subcontract was entered into in September 1968.

l. That in approximately October and November 1968, INGALLS evaluated the proposed Government dates for delivery of steel and determined that the proposed schedule would exacerbate the yard's platen capacity problem increasing the size of the previously contemplated overload and would necessitate a second subcontract at a premium over INGALLS in-house cost.

m. That further problems with Government furnished steel forced INGALLS to enter into a third subcontract during the latter half of 1969 which subcontract was performed at a premium over INGALLS in-house costs.

n. That as a result of the late delivery of Government furnished steel and the late return of subcontracted hull sections to the INGALLS yard, the keel for the SSN 680 submarine was delayed from its originally scheduled erection date of May, 1969 to November, 1969.

o. That once a firm date for laying the SSN 680 keel was established in the fall of 1969, INGALLS analyzed the manpower requirements to complete the submarines within the 11 month extended contract.

p. The results of this analysis reflected that INGALLS would have to hire 1300 men in a three month period, a recruiting effort INGALLS viewed as impossible to achieve.

q. That this analysis and the graph appearing on page 39 of Attachment A was performed and prepared in November 1969.

r. That as result of this analysis, INGALLS management decided to extend the contract delivery dates for the three submarines under the aforementioned contract by an additional 6 months in order to spread out the manpower increase and make it achievable.

s. That a November 1969 analysis showing that the additional 6 month extension would solve the "impossible" problem (indicated on Page 39 of Attachment A) is depicted by a graph appearing on Page 41 of Attachment A.

8. Among the increased costs allegedly incurred and claimed by INGALLS from the Navy as a result of the alleged facts set forth in Attachments A and B are the following:

a. Premium Costs for Subcontracting.

b. Loss of efficiency due to loss of learning.

c. Delay and disruption due to the Navy's failure to deliver steel in a timely fashion.

d. "Escalation" as a result of being forced to perform the work in a later time frame.

B. On or about the 26th day of May, 1972, in Arlington County, Virginia, in the Eastern District of Virginia, the defendant, LITTON SYSTEMS, INC., with gross, wanton, and reckless disregard for the truth, made and presented and caused to be made and presented to the United States Navy, an agency of the United States of America, a claim against the United States to wit: a volume containing a 42 page narrative (Attachment A) as modified and supplemented by Attachments B and C, all as more fully described in paragraph A above, in the approximate amount of $37,000,000 pursuant to the aforementioned contract which claim the defendant then and there well knew was false, fictitious and fraudulent in that Attachments A, B and C on which the claim was based and which were fully incorporated therein and made a part thereof, contained misrepresentations and omissions of material facts.

(Violation of Title 18, United States Code, Section 287.)

A TRUE BILL:

/s/ DARRELL L. RAINES

FOREMAN

/s/ WILLIAM B. CUMMINGS

William B. Cummings
United States Attorney

/s/ FRANK W. DUNHAM, JR.

Frank W. Dunham, Jr.
Assistant United States Attorney

/s/ RICHARD D. KIBBY

Richard D. Kibby
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Supreme Court, U. S.
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No. 77-1689

In the Supreme Court of the United States

OCTOBER TERM, 1978

LITTON SYSTEMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A13-A24) is reported at 573 F.2d 195. The opinion of the district court (Pet. App. A1-A12) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A25) was entered on April 4, 1978. A petition for

rehearing with a suggestion for rehearing *en banc* was denied on April 27, 1978 (Pet. App. A26). The petition for a writ of certiorari was filed on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the indictment against petitioner should have been dismissed because the prosecutor during preindictment negotiations offered to terminate the criminal investigation if petitioner would agree to the reopening of a related civil administrative proceeding.

STATEMENT

An indictment filed in the United States District Court for the Eastern District of Virginia charged petitioner, a corporation engaged in the construction of combat ships for the United States Navy, with filing a fraudulent claim with the Navy, in violation of 18 U.S.C. 287 (Pet. App. A27-A34). The district court dismissed the indictment (*id.* at A1-A12), but the court of appeals vacated the order of dismissal and remanded the case for trial (*id.* at A13-A24).

1. The indictment stemmed from a claim that petitioner filed in 1972 seeking $30 million as compensation for increased costs petitioner allegedly incurred under its contract to construct three nuclear submarines (Pet. App. A14). After an adverse decision by the Navy contracting officer, petitioner sought review of its claim before the Armed Services Board of Contract Appeals (the "Board"). On April 16, 1976, the Board sustained petitioner's appeal in part and awarded it more than $16 million (C.A. App. A485-A600).[1] The parties agreed not to seek reconsideration of the Board's decision (C.A. App. A39).[2]

In March 1975, while the Board proceeding was pending, a federal grand jury was impanelled in the Eastern District of Virginia to investigate the possibility that petitioner's claim had been fraudulent (C.A. App. A47, A164). When notified of the grand jury investigation, petitioner's attorney, Vincent Fuller, inquired whether there might be an alternative short of criminal prosecution (Pet. App. A14). One of the prosecutors replied that the government did not then have sufficient information to make such a determination (*ibid.*). Fuller requested that he be given advance notice of any decision to seek an indictment so that he could attempt to convince the government not to institute criminal charges (Pet. App. A14; C.A. App. A196).

Toward the end of the grand jury term, the prosecutors concluded that there was strong evidence of fraud, but that they had found insufficient evidence of criminal intent to justify prosecution (C.A. App. A190). Accordingly, they decided to permit the

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[1] "C.A. App." refers to the joint appendix in the court of appeals.

[2] The Board's award, however, remained subject to attack in the Court of Claims on the ground of fraud (Pet. App. A19).

grand jury's term to expire without the return of an indictment but to continue the investigation, with the focus solely on petitioner, rather than on individual corporate officials (C.A. App. A48-A49, A190).

At about this time, an attorney retained by petitioner to represent its employees before the grand jury suggested that the prosecutors contact Fuller to discuss alternatives to criminal prosecution (Pet. App. A15; C.A. App. A126, A191-A192). On September 9, 1976, the chief prosecutor advised Fuller that the investigation had developed evidence that demonstrated the fraudulent nature of petitioner's claim, but that, in view of the lack of sufficient evidence on the element of intent, the government would not seek an indictment prior to the end of the grand jury's term (Pet. App. A15; C.A. App. A49-A50, A193-A194). The prosecutor also informed Fuller that the investigation would proceed in an effort to develop additional evidence of intent (*ibid.*). The prosecutor stated that the government might consider terminating its criminal investigation, but he expressed reluctance to outline the government's proposal without receiving prior assurances that the proposal "would not be taken as a threat or treated as other than a good faith attempt to resolve the intent question" (*ibid.*). Fuller responded that he desired to continue the discussion and that he would terminate the talks if he considered them improper (C.A. App. A50, A194).

The prosecutor then offered the following proposal: (1) both petitioner and the Navy would move to re-

open the Board proceedings;[3] (2) petitioner and the Navy would jointly apply to the district court for an order pursuant to Fed. R. Crim. P. 6(e) to permit inspection of the grand jury materials by both parties for use in the reopened Board proceedings; (3) the government would not assert fraud as a defense in the Court of Claims to any final Board judgment rendered in favor of petitioner and would not institute any civil fraud actions; (4) the government would terminate its criminal investigation of petitioner's claim (C.A. App. A50-A51, A194). In addition, after receiving further evidence in the reopened proceeding, the Board would be free to modify its award in favor of either party or to let its original award stand (*ibid.*).

Fuller reacted favorably to the proposal and suggested that the discussions continue at a second conference. At that conference, held on September 14, 1976, the prosecutors outlined the evidence establishing the falsity of petitioner's claim and discussed with petitioner's representatives the necessary procedures for reopening the Board proceeding and obtaining the required corporate and governmental approvals of the settlement (C.A. App. A51, A195).[4]

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[3] The government attorneys believed that the Board's ruling in petitioner's favor had been based upon certain false representations made by petitioner in support of its claim (C.A. App. A48).

[4] At the outset of the meeting, petitioner's representatives again agreed that the discussion would not be used at a later date as the basis for a claim of prosecutorial misconduct (C.A. App. A51, A195).

At no time during either meeting did petitioner's representatives intimate that there were any improprieties in the proposals under discussion. On September 15, 1976, however, Glen McDaniel, petitioner's executive board chairman—who had not been present at either meeting—complained to Deputy Attorney General Tyler that petitioner was being threatened with indictment if it did not agree to reopen the Board proceeding (C.A. App. A51-A52, A195-A196).[5] After inquiring into the nature of the discussions, the Deputy Attorney General informed McDaniel, by letter dated October 7, 1976, that he had found no impropriety, and he suggested that Fuller contact the government's attorneys to resume the negotiations (C.A. App. A67).[6] In addition, the Deputy Attorney General reaffirmed the point, previously explained to Fuller (C.A. App. A120-A121, A191), that government counsel participating in the negotiations were without authority to reach a settlement without approval from their superiors in the Department of Justice (C.A. App. A67).

At Fuller's request, a third meeting was held on October 12, 1976, for the purpose of exploring further the settlement proposal (C.A. App. A196-A197,

[5] When informed of the substance of McDaniel's complaint, Fuller told the prosecutor that it violated their understanding, concerning discussion of the proposal (C.A. App. A52, A195).

[6] The text of Deputy Attorney General Tyler's letter is reproduced in the opinion of the court of appeals (Pet. App. A16-A17 n. 1).

A201). In a letter from McDaniel dated November 1, 1976, petitioner rejected the government's settlement offer (C.A. App. A68-A71).

2. In early January 1977, on the basis of additional evidence developed by the government after the expiration of the original grand jury's term, the prosecutors sought and obtained authorization from Attorney General Bell and Acting Deputy Attorney General Thornburgh to present the matter to a new grand jury for the purpose of seeking an indictment (C.A. App. A52, A128-A133, A197, A242-A243).[7]

The prosecutors notified Fuller about the decision to prosecute. At Fuller's request, on March 11, 1977, the prosecutors met with petitioner's representatives, who offered to reopen the Board proceeding if the government were willing to forego instituting criminal charges (C.A. App. A197-A198). On April 5, 1977, petitioner's representatives met with the Attorney General, who rejected petitioner's proposal, stating that in his view there was sufficient evidence to warrant prosecution (C.A. App. A198-A199). On the following day, the grand jury returned the instant indictment (Pet. App. A27-A34).

3. Petitioner, represented by new counsel, moved to dismiss the indictment on the ground of governmental misconduct (C.A. App. A11). In granting

[7] The additional evidence consisted of documents that had not been shown to the first grand jury, an FBI analysis of certain documents, and testimony of witnesses who had not appeared before the first grand jury (C.A. App. A129-A133, A242-A243).

the motion (Pet. App. A1-A12), the district court observed that "[h]ad the bargain been proposed *after* indictment it arguably could be justified," but it concluded that the government had engaged in misconduct through its alleged "*threat* to use, as *well* as the actual use of, the grand jury as a bargaining tool in an effort to upset the final civil award to which [petitioner] was entitled" (*id.* at A6-A7; footnote omitted; emphasis in original).

The court of appeals vacated the dismissal order, holding that the government's actions in conducting pre-indictment negotiations with petitioner were permissible under this Court's ruling in *Bordenkircher* v. *Hayes*, No. 76-1334, decided January 18, 1978 (Pet. App. A18-A22). In addition, the court concluded that the prosecutors had acted in good faith in initiating the negotiations, that they had not threatened to indict petitioner if it rejected the government's proposal but had merely stated that the investigation would continue, and that the Attorney General's subsequent decision to prosecute was not vindictive or retaliatory (*ibid.*).

ARGUMENT

1. Petitioner's effort to obtain pre-trial review of the validity of the indictment should be rejected as premature. If the district court had denied petitioner's motion to dismiss, its ruling would not have been subject to interlocutory appeal. See *United States* v. *MacDonald*, No. 75-1892, decided May 1, 1978; *Parr*

v. *United States*, 351 U.S. 513; *Cobbledick* v. *United States*, 309 U.S. 323. Accordingly, since the court of appeals' reinstatement of the indictment puts petitioner in the same position as the district court's denial of its motion, there is no reason for this Court to delay the trial by reviewing the case before final judgment. Petitioner may be acquitted at trial, in which case its claim will be moot. If, on the other hand, petitioner is convicted and its conviction is affirmed, it will then be able to present the claim raised in its petition, as well as any other issues that may arise during the trial, by seeking review in this Court of the final judgment. *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-259.

2. In any event, there is no merit to petitioner's contention (Pet. 15-27) that the indictment should have been dismissed because petitioner was denied due process.

a. Despite petitioner's repeated assertions to the contrary, the court of appeals correctly concluded (Pet. App. A19) that petitioner was not "threatened" with indictment if it did not agree to the government's proposal. Indeed, the prosecutors could not have threatened petitioner with indictment, since—as they candidly acknowledged to petitioner's counsel during their discussions in September and October 1976—they believed there was insufficient evidence of criminal intent to warrant prosecution at that time. As the prosecutors explained, no indictment would be filed against petitioner unless additional evidence of intent was developed for presentation to

the grand jury and the prosecution was authorized by the appropriate officials in the Department of Justice. The prosecutors simply notified petitioner that unless some agreement were reached permitting presentation to the Board of the newly discovered evidence, they would continue their investigation in an effort to determine whether the false claims had been presented with criminal intent. Additionally, the prosecutors disclosed to petitioner's counsel the evidence of falsity that had already been discovered, so that petitioner could make an informed response to the government's proposal.

In these circumstances, as in *Bordenkircher* v. *Hayes*, No. 76-1334, decided January 18, 1978, slip op. 8, the prosecutor "openly presented [petitioner] with the unpleasant alternatives"—in this case the alternatives of agreeing to reopen the Board's judgment or risking the possibility that the continuing investigation might lead to criminal fraud charges and that the Board's award might be upset in the Court of Claims.

Since the Board's award was vulnerable to attack in the Court of Claims as having been procured by fraud, petitioner was subject to continued criminal investigation, and the government's intention to continue its investigation "was clearly put forth at the outset," petitioner was "fully informed of the true terms of the offer when [it] made [its] decision" to reject that offer. *Id.* at 3.

Moreover, the prosecutor's decision whether or not to terminate the investigation, like the determination

"whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, *supra*, slip op. 7; footnote omitted. See also *United States* v. *Nixon*, 418 U.S. 683, 693; *Newman* v. *United States*, 382 F.2d 479 (C.A. D.C.); *United States* v. *Cox*, 342 F.2d 167, 171 (C.A. 5), certiorari denied, 381 U.S. 935. It was therefore permissible to confront petitioner with the realistic possibility that further investigation might warrant its prosecution unless it agreed to reopen the Board proceeding for the purpose of permitting the parties to introduce additional evidence, so long as petitioner was "free to accept or reject the prosecution's offer." *Bordenkircher* v. *Hayes*, *supra*, slip op. 6.

Although petitioner emphasizes (Pet. 23) that the government repudiated its offer before petitioner belatedly sought to accept it, the record clearly shows that petitioner was free to accept or reject the offer until the circumstances changed materially. Petitioner's representatives spent nearly two months weighing the essentially monetary costs and benefits involved, and they ultimately decided to reject the offer. Only after the government had obtained additional evidence of criminal intent and the prosecution had been authorized did petitioner belatedly seek to reach a settlement. At that point, in light of the changed circumstances that properly bore on the prosecutorial decision, the government was fully justified in refusing petitioner's offer.

This case is therefore unlike *Blackledge* v. *Perry*, 417 U.S. 21, and *North Carolina* v. *Pearce*, 395 U.S. 711, upon which petitioner relies (Pet. 18-22), since those cases involved "the States' unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction." *Bordenkircher* v. *Hayes*, *supra*, slip op. 6. Here, in contrast, petitioner was not punished for exercising its right to rely on the finality of the Board's decision. Rather, the indictment resulted from the development of sufficient evidence of fraudulent intent, which the government admittedly lacked at the time it made its offer to petitioner. See *Blackledge* v. *Perry*, *supra*, 417 U.S. at 29 n. 7; *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 726.[8] Nor can the indictment be attributed to actual prosecutorial vindictiveness, since the prosecution was personally authorized by the Attorney General and the Deputy Attorney General, neither of whom had been involved in the settlement discussions. Both lower courts agreed that these officials, "who made the critical decisions in this case, were [not] vindictive or retaliative" (Pet. App. A20).

[8] For this reason, petitioner's reliance (Pet. 24-26) on *United States* v. *Groves*, 571 F.2d 450 (C.A. 9), *United States* v. *DeMarco*, 550 F.2d 1224 (C.A. 9), certiorari denied, 434 U.S. 827, and *United States* v. *Ruesga-Martinez*, 534 F.2d 1367 (C.A. 9), is misplaced. In each of those cases, there was not only the appearance of vindictiveness, but also a strong probability of actual vindictiveness because the only meaningful intervening event between the initial and revised prosecutorial decisions had been the defendant's successful assertion of his legal rights. Here, however, since the record reflects a neutral explanation for the initiation of the prosecution, and since no actual retaliatory motivation on the part of the Attorney General has been shown, the indictment was permissible even though it was returned after petitioner had exercised its right to reject the government's proposal. See *United States* v. *Thurnhuber*, 572 F.2d 1307, 1310 (C.A. 9); *United States* v. *Nell*, 570 F.2d 1251, 1254-1255 (C.A. 5); *United States* v. *Ricard*, 563 F.2d 45, 47-48 (C.A. 2), certiorari denied, No. 77-5852, March 6, 1978; *United States* v. *Partyka*, 561 F.2d 118, 124-125 (C.A. 8), certiorari denied, No. 77-5461, January 16, 1978.

b. Petitioner contends (Pet. 15-18), however, that the government's settlement offer was improper because it was an effort to resolve the related civil and criminal aspects of petitioner's case. We recognize the uniquely sensitive position occupied by government counsel whenever parallel criminal and civil proceedings are pending or contemplated against a single litigant. At the same time, the prosecutor must necessarily have broad discretion to weigh the "[m]yriad factors" that should be considered in determining the proper charges to bring in a particular case. *Newman* v. *United States*, *supra*, 382 F.2d at 481. See *United States* v. *Nixon*, *supra*, 418 U.S. at 693; *United States* v. *Cox*, *supra*, 342 F.2d at 171. In a given case, the prosecutor may properly conclude that society's interest will best be served by pursuing alternatives short of criminal prosecution.[9]

[9] Indeed, a memorandum from the Attorney General relating to the exercise of prosecutorial discretion instructs Department of Justice attorneys to consider the possibility of civil, administrative, or other proceedings in lieu of criminal prosecution (C.A. App. A79-A81). A similar policy was adopted by Congress in Section 305 of the Food and Drug Act, 52 Stat. 1045, as amended, 21 U.S.C. 335, which provides that the

The government, of course, must not be allowed to abuse its position as prosecutor to coerce a civil litigant into an unjust settlement, but the facts here show no such abuse. To begin with, petitioner is unlikely to have been coerced into giving up a $16 million award by the possibility that it might be subject to, at most, a $10,000 fine for a criminal offense. Moreover, the history of the negotiations rebuts any inference that the government abused its prosecutorial powers in an effort to compel petitioner to accept an unfair settlement. It was petitioner's counsel who first suggested that the parties discuss an alternative to criminal prosecution. Then, after carefully considering the government's offer, petitioner rejected it. Finally, as the court of appeals pointed out (Pet. App. A22), there was nothing unfair about the substance of the government's proposal, since "[t]he material elements of both the civil and criminal proceedings were closely interwoven, and the proposal was an effort to resolve all facets of an essentially single controversy." The proposal sought reconsideration of the Board's award in light of information not previously available to the Board. It thus was de-

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target of an investigation should be given notice of impending charges to permit an opportunity for negotiation of a settlement prior to indictment. Following service of this statutory notice, the vast majority of cases have been settled without a criminal prosecution. *United States* v. *Kordel*, 397 U.S. 1, 4 n. 5. Similar conferences are also routinely held in tax cases before a recommendation for prosecution is made. See, *e.g.*, *United States* v. *Goldstein*, 342 F. Supp. 661, 664-668 (E.D. N.Y.).

signed to bring out the truth about petitioner's claim, not to deprive petitioner of its right, if any, to compensation. Compare *MacDonald* v. *Musick*, 425 F.2d 373 (C.A. 9), certiorari denied, 400 U.S. 852.

Nor, contrary to petitioner's assertion (Pet. 17-18), did the prosecutor's conduct contravene the ethical standard expressed in DR 7-105(A) of the ABA Code of Professional Responsibility, which provides that "[a] lawyer shall not present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter." Both the first grand jury's investigation and the investigation pursued after that grand jury's term had expired were conducted for the purpose of establishing criminal liability—not " 'solely to obtain an advantage in a civil matter.' " The so-called "threat" was merely the government's truthful statement that it planned to continue its investigation unless the entire matter could be settled before the Board and that it intended to seek an indictment if evidence of a crime was uncovered.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF.

The Solicitor General's Brief focuses on the sensitive and important issue which requires this Court's attention and, indeed, the Brief is tantamount to a request by the government for guidance. The Solicitor General recognizes "the uniquely sensitive position occupied by government counsel whenever parallel criminal and civil proceedings are pending or contemplated against a single litigant." (Brief, p. 13). The litigant, of course, occupies an equally sensitive position. This is because of the inherent conflict of interest in the government's role as public prosecutor and private contractor and the private party's dual role as potential criminal defendant and civil plaintiff with a money claim against the government. No one could dispute that Litton Systems, Inc. ("Litton"), as a potential criminal defendant, is entitled to face a prosecutor whose exercise of discretion is wholly untainted by a civil monetary interest. Equally, Litton is entitled to face an opponent in a civil contract action who is free from temptation to bring its police powers into the civil arena. The two areas were undeniably mixed in this case.

Turning to the government's role as prosecutor, it is clear from the Solicitor General's Brief that the government recognizes no standard, beyond its self-proclaimed good faith, to seal off its prosecutorial discretion from taint by civil self-interest. In this case the Solicitor General himself concedes that *civil contract considerations* entered into the prosecutor's deliberations.[1] And the Fourth Circuit has placed its imprimatur on such conduct, mislabeling it mere "plea bargaining" and ignoring the government's inherent conflict of interest.

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1. In footnote 3 of his Brief, the Solicitor General candidly concedes that "[t]he government attorneys [*i.e.* the prosecutors!] believed that the Board's ruling in petitioner's favor had been based upon certain false representations made by petitioner in support of its claim."

The other side of the coin is the government's role as a civil contractor. The Solicitor General recognizes, as he must, that "[t]he government, of course, must not be allowed to abuse its position as prosecutor to coerce a civil litigant into an unjust settlement[2] . . . ." (Brief, p. 14). A more complete and correct statement would be that the government must not be allowed to use its position as a *prosecutor* to coerce a *civil* litigant into *anything*, particularly at a time when the government admittedly has insufficient evidence of criminal intent to prosecute anyone for anything. That is because to do so creates the very conflict of interest which taints this case. Who can determine what "settlement" or "resolution" is just or unjust when the spectre of the government's unbridled prosecutorial discretion looks over a private contractor's shoulder at any negotiation with the government. The District Court found that the government "used the implied threat of indictment in an effort to obtain reconsideration of what Litton, presumptively innocent, was otherwise entitled to." (A.6)

In an effort to sanitize the prosecutor's determination to indict, the Solicitor General, without any support from the record, asserts that the hastily obtained indictment resulted from some new development of sufficient evidence of fraudulent intent, which the government, after a massive four-year investigation, admittedly lacked (Brief, p. 12) at the time of the threat.[3] This "new evidence" is a

2. There was in fact no civil "settlement" ever proposed in this case. Just the opposite. What the government sought to force Litton to do was *reopen* a civil award that was already *final*, for a potential benefit to the government's own civil self-interest.

3. Indeed, the Solicitor General places the entire freight of his Brief on this slender reed. On the basis of this nonexistent "new evidence" he seeks to distinguish *Pearce*, *Blackledge* and a line of Ninth Circuit cases, as well as to sanitize the mingling of criminal and civil functions. If such evidence never existed (and it did not), the Solicitor General would necessarily appear to agree with Litton as to the serious problem involved here.

figment of the government's imagination. The reference to it in the Solicitor General's footnote 7 is supported only by a citation to conclusory self-serving statements by the assistant United States attorney, not to any actual evidence itself. The true situation is that when Litton, in its request for a Bill of Particulars as to this alleged new evidence, sought to find out what new material had been turned up, the government answered that no further particulars were necessary because it had, prior to the extortionate proposal at issue, "[sat] down with [Litton's] counsel for two hours *going through everything the Government has in its case.*" (Transcript of April 29, 1977 argument on Litton's motion for a bill of particulars, pp. 26-27)(emphasis added). There may have been new summaries after that session, but there was *never* any new substantive evidence of intent to defraud. Therefore, even under the *Blackledge* and *Pearce* standards which apply when only the field of criminal law is involved, the government failed to place in the record any new evidence that would purge the inference of vindictiveness.

Despite this, the Solicitor General concludes his Brief by assuring this Court that "[t]he so-called 'threat' was merely the government's truthful statement that it planned to continue its investigation unless the entire matter could be settled[4] before the Board and that it intended to seek an indictment if evidence of a crime was uncovered."

3. (Cont'd.)

4. Here the government again, as it does throughout the Brief, misleadingly characterizes its proposal as one involving "settlement." As noted in Footnote 2 above, the proposal made was not one to *settle* anything, but rather to *reopen* a final judgment against the government—a result the government could achieve by no other means than coercion.

(Brief, p. 15) This representation is directly contrary to what actually happened. It must be remembered that the threat to indict came after *four years* of unsuccessful investigation and *eighteen months* of unsuccessful presentation to an indicting grand jury empaneled solely to deal with Litton. It came at a time when the government had concluded that, despite this exhaustive investigation, it lacked evidence to indict *any* individual natural person for any knowing attempt to file a false claim—and it has never since sought to indict any natural person. Despite this four year background, the following events occurred with remarkable speed after Litton, on November 1, 1976, rejected the government's threatening proposal. Barely two months later, in early January 1977, the prosecutors handling the case convinced the new Attorney General that they had "developed" the new evidence of intent which had eluded them for four years.[5] Thereafter, the prosecutors empaneled a new grand jury and on April 6, 1977, obtained a one count indictment against the corporation alone. The government has at all times refused to indicate what this supposed "new evidence" of subjective intent was. But significantly, the indictment was only against Litton, though a corporation can only act through its employees who are natural persons. Judge Bryan, the sophisticated trial judge who heard the government's argument on this matter, found unequivocally as a fact that the motivation of the government in obtaining the indictment, under these circumstances, was retaliation against

5. The conference with Attorney General Bell, who was then in his first week in office, was *ex parte*. Neither Litton nor this Court can know what representations were made to him by his subordinates concerning this complex case. However, Judge Bryan concluded that the government's decision to indict was motivated by the vindictiveness of the prosecutors. It must be presumed that this motivation slanted any presentation to the new Attorney General.

Litton for its refusal to capitulate to the threatening proposal. The chronology of events and the refusal of the government to disclose its "new evidence" of intent permit no other inference and fully refute the government's unsupported representation to this Court.

These important issues can and should be decided by this Court now. There is no technical bar to hearing this appeal and this Court regularly grants review of cases in an identical posture, when, as here, the issues are vital and the facts necessary for decision are fully in the record.[6] The very nature of the problem involved in this case compels a prompt resolution. If the perversely reasoned decision of the Fourth Circuit is not corrected now, it is highly conceivable that there may not soon be another chance. If the present case were not reviewed and were then won or plea bargained by Litton, the Fourth Circuit precedent would remain on the books. That would be all the predicate necessary to tempt the government to even further and greater abuse by coercively obtaining civil advantage for the government through the implied threat

6. A few illustrative recent decisions are: *National Broiler Marketing Association v. United States*, 56 L. Ed. 2d 728 (1978) (Circuit Court of Appeals reversed the District Court's grant of summary judgment. The Supreme Court granted the writ of certiorari and affirmed.); *Kulko v. Superior Court*, 56 L. Ed. 2d 132 (1978) (Defendant moved to quash the service of a summons on jurisdictional grounds in the state courts. The California Supreme Court refused to quash the summons. The Supreme Court granted the writ of certiorari and reversed.); *City of Lafayette v. Louisiana Power & Light Company*, 55 L. Ed. 2d 364 (1978) (Defendant's counterclaim was dismissed, but the Circuit Court of Appeals reversed. The Supreme Court granted the writ of certiorari and affirmed.); *Oliphant v. Suquamish Indian Tribe*, 55 L. Ed. 2d 209 (1978) (Petitioner's criminal trial before an Indian Tribunal was stayed pending his petition for habeas corpus in federal court. The District Court and the Circuit Court of Appeals refused to issue a writ of habeas corpus. While the criminal trial was stayed, the Supreme Court granted the writ of certiorari and reversed.).

of indictment. Since the Pentagon is in the Fourth Circuit, the decision below invites the government to control the venue of any indicting grand jury by empanelling it in Virginia. Moreover, unless clear guidelines are pronounced by this Court now, the civil "settlements" coerced in the future by abuse of the government's prosecutorial might would be, as the government euphemistically characterizes them, "voluntary" and the vital issue of abuse would never reach this Court again.

CONCLUSION.

It is fair to say that the Solicitor General's Brief is a tacit plea to this Court for guidance. We respectfully urge this Court to heed that plea, and rescue the government from the dangerous and buoyless sea on which the Fourth Circuit has cast it adrift.

Respectfully submitted,

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